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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91194974
Party	Defendant GFA Brands, Inc.
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**UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

PROMARK BRANDS INC., & H.J.
HEINZ COMPANY,

Opposers,

v.

GFA BRANDS, INC.,

Applicant.

**Opposition Nos. 91194974 (Parent)
and Opposition No. 91196358**

U.S. Trademark Application 77/864,305
For the Mark **SMART BALANCE**

U.S. Trademark Application 77/864,268
For the Mark **SMART BALANCE**

**APPLICANT’S NOTICE OF FILING OF CORRECTED CERTIFIED TESTIMONY
DEPOSITION TRANSCRIPT AND EXHIBITS OF LEON KAPLAN**

Pursuant to 37 C.F.R. § 2.125(c) and Rule 703.01(k) of the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”), Applicant GFA Brands, Inc. hereby files with the Board, and notifies Opposers of the filing of, the corrected certified testimony deposition transcript and accompanying exhibits of Leon Kaplan, whose testimony deposition was taken on April 23, 2013.

Pursuant to Section 703.01(n) of the TBMP, the transcript has been corrected by the officer before whom the deposition was taken. The executed and notarized Errata Sheet listing the corrections has also been included at the end of the transcript.

Dated this 13th day of September, 2013.

/s/ Johanna M. Wilbert

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent by First Class U.S. Mail, postage prepaid, with a courtesy copy via e-mail, on this 13th day of September, 2013, to

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*PROMARK BRANDS INC. VS.
GFA BRANDS, INC.*

*LEON KAPLAN
April 23, 2013*



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1 UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

3 -----x
4 PROMARK BRANDS INC.,

5 Opposition Nos. 91194974(Parent) &

6 H.J. HEINZ COMPANY,
7 Opposition No 91196358,

8 U.S. Trademark Application 77/864,305
9 For the Mark SMART BALANCE

10 Opposers,

11 -versus-

12 GFA BRANDS, INC.,

13 U.S. Trademark Application 77/864,268
14 For the Mark SMART BALANCE

15 Applicant.

16 -----x

17 222 East 41st Street
18 New York, New York

19 April 23, 2013
20 9:25 a.m.

21
22 DEPOSITION of LEON KAPLAN, taken pursuant to
23 Notice, before Fran Insley, a Notary Public of the
24 States of New York and New Jersey.
25

26 ELLEN GRAUER COURT REPORTING CO. LLC
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1 ----- I N D E X -----

2	WITNESS	EXAMINATION BY	PAGE
3	LEON KAPLAN	MR. CROSS	4, 129
4		MS. GOTT	59

5

6

7 ----- E X H I B I T S -----

8	KAPLAN	DESCRIPTION	FOR I.D.
9	Exhibit 1	Decision	109
10	Exhibit 2	Decision	113

11

12 (EXHIBITS TO BE PRODUCED)

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1 L E O N K A P L A N ,
2 having been first duly sworn by the
3 Notary Public, was examined and
4 testified as follows:

5

6 EXAMINATION BY

7 MR. CROSS:

8 Q. What is your full name?

9 A. Leon Burt Kaplan.

10 Q. Where do you work?

11 A. Princeton Research and Consulting
12 Center.

13 Q. What is your title?

14 A. President and CEO.

15 Q. What is the business of Princeton
16 Research?

17 A. We do survey research primarily. We
18 do social science research, specializing in
19 marketing research, advertising research and
20 litigation support research.

21 Q. We will get into that in a bit. I'm
22 going to first show you a December 2011 report
23 from Dr. Sabol which had previously been marked
24 at Johnson's trial testimony as Johnson
25 Exhibit 1. Can you -- do you recognize that as

1 KAPLAN

2 Dr. Sabol's survey that he conducted in this
3 case?

4 A. Yes.

5 Q. What -- did you see it soon after we
6 engaged you in this matter?

7 A. Yes.

8 Q. What did we ask you to do in
9 connection with Sabol's survey?

10 A. To read it, give you my impressions
11 and evaluate it.

12 Q. I'm now going to show you what has
13 previously been marked as Johnson Exhibit 4.
14 Can you tell me what this is, please?

15 A. The report I prepared evaluating Dr.
16 Sabol's study.

17 Q. The report that you prepared,
18 Johnson Exhibit 4, did you prepare it in
19 accordance with accepted standards and
20 methodologies in the field of survey research?

21 MS. GOTT: Objection. Foundation.

22 Q. Go ahead.

23 A. Yes, as I understand them.

24 Q. We will get into your credentials in
25 a bit. So we will link that up later. Do you

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hold the opinions that are expressed in Johnson Exhibit 4 to a reasonable degree of certainty in your field?

A. Yes, I do.

Q. Did you come to any conclusions based on your critique of the Sabol survey?

A. Yes, I did.

Q. What generally were or was that conclusion?

A. The conclusion, which really spelled out in paragraph 30 in the summary, is that the study is fraught with shortcomings that don't let it meet the minimum standards for acceptable surveys for litigation and that because of those massive shortcomings, I think the study has no probative value. I think the numbers that he generates are meaningless numbers.

Q. Do you believe the Sabol survey has any -- yields any valuable information for the issues involved in this trademark opposition?

A. Not at all for the issues involved in this matter.

Q. Do you hold your opinions that

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2 you've just stated to a reasonable degree of
3 certainty in your field?

4 A. Absolutely.

5 Q. Before addressing the details of
6 your opinions and your report, I would like to
7 ask you some questions about your training and
8 background that enabled you to reach these
9 conclusions. Did you go to college?

10 A. Yes, I did.

11 Q. Where and what degree did you
12 achieve?

13 A. Brooklyn College, right here in New
14 York. Bachelor's in psychology.

15 Q. Any graduate studies after college?

16 A. Yes, Master's Degree in consumer
17 psychology with a minor in social research
18 methods, I think, from Purdue University.
19 Ph.D. in consumer industrial psychology from
20 Purdue University, post-doc from the Consumer
21 Research Institute in Washington, D.C. and an
22 MBA from the Wharton School.

23 Q. When did you get the last of your
24 degrees?

25 A. The last degree was -- I got it in

1 KAPLAN

2 1979.

3 Q. That was your MBA?

4 A. That was correct, yes.

5 Q. From Wharton?

6 A. From Wharton.

7 Q. Could you take me through your work
8 history focusing on the jobs and positions
9 you've held that deal with -- dealt with survey
10 research techniques?

11 A. Sure. In graduate school I worked
12 as an interviewer for the US Public Health
13 Service. I had summer positions, one at
14 General Mills and the other with the Dupont
15 company. When I graduated from --

16 Q. Just a second. What were those
17 summer positions involving?

18 A. I was a summer intern at General
19 Mills in their marketing research group and I
20 was a research psychologist in the advertising
21 department at the Dupont company.

22 Q. Thank you. Sorry to interrupt.

23 A. No problem. I should have been
24 clearer. After I got my Ph.D., I worked at the
25 Dupont company, eventually becoming a senior

KAPLAN

research psychologist. I worked there for four years. Then I took a position at Opinion Research Corporation in Princeton becoming a vice president in the custom research group, the group that does custom design studies. I was there from 1975 to '79, at which point I decided to open the Princeton Research and Consulting Center. I founded it in '79.

Q. You've been there ever since?

A. Ever since.

Q. Do you belong to any professional associations or societies?

A. Yes, I do. As I said, I'm a psychologist, so I belong to the American Psychological Association. There is -- it has -- the APA has different subgroups.

I belong to the Society for Consumer Psychology and I belong to the Psychology Law Society. I also belong to American Psychological Society and the Marketing Research Association.

Q. Have you taught any courses or lectured on topics related to survey research techniques and methods and standards?

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A. Yes, in graduate school I taught consumer psychology, industrial psychology, educational psychology. After I graduated, I was adjunct faculty at the University of Delaware for about four years teaching industrial psychology, consumer psychology and consumer research methods and I have guest lectured at Montclair State in -- to their seniors on, school of business, on applications of surveys, on intellectual property research really in a general sense and on advanced statistical methods.

Q. There is a resume or CV that you have attached to Johnson Exhibit 4, your report. Is that reasonably up to date?

A. Yes, it is. I believe it -- yes, it is up to date.

Q. I know you've given some deposition testimony at least in this case which should be added to the list of depositions you've provided?

A. That is correct.

Q. Any other event additions?

A. I believe one other deposition in

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another matter. We are trying to find a trial date and I may have to add one on Friday in another matter which we are trying to schedule.

Q. Other than those additions, your CV attached to your report is up to date?

A. Yes, sir.

Q. I offer Johnson Exhibit 4, which is the Leon Kaplan report of this case.

What has the focus of your work been at Princeton Research? You told us a little bit about what Princeton Research does, but what has the focus of your work been there?

A. Well, if I understand you right, client contact, design studies, supervise their execution, do the analyses and prepare the reports.

Q. When you say studies, what does that mean?

A. Research. We, as I said, do different kinds of survey research, traditional marketing research studies, some advertising research, some other -- we do stuff on comprehension of pharmaceutical information and litigation support research.

1 KAPLAN

2 Q. Of the work that you've done at
3 Princeton Research, about how many times have
4 you been involved in designing a survey?

5 A. I design everything other than some
6 work we do and it has been in litigation for
7 other experts who don't have the capability to
8 field studies and in those instances, I provide
9 design support.

10 I offer my observations, my
11 thoughts, my comments and in a sense, while I
12 don't design the study, I share in, I hope,
13 think I share in the creation of the final
14 product that is fielded and my responsibilities
15 are for the fielding or the execution of the
16 study, typically up through the analyses with
17 guidance from the principal researcher,
18 testifying expert.

19 Q. Could you give us a ballpark
20 estimate of the number of surveys in which you
21 have participated personally in either design
22 or execution of the survey?

23 A. A couple of thousand probably.

24 Q. Of those couple of thousand, about
25 how many -- what percentage of them did you

1 KAPLAN

2 contribute to the design of the survey itself?

3 A. Something close to three quarters
4 probably.

5 Q. Of all the surveys that you have
6 personally been involved in in your work, about
7 what percentage of them have been used in
8 litigation, just ballpark?

9 A. As a ballpark, I would say probably
10 around a quarter of the studies we've done.

11 Q. So that would be hundreds?

12 A. Yes, that's not unreasonable, yes.
13 I must state that in the beginning of the
14 company's business, we did not do litigation
15 survey work because I don't know if there was
16 really very much of it and initially evaluated
17 a study, as I'm doing today, in 1982 and in
18 1988 we began -- there was nothing before and
19 nothing after until '88 when we began to do --
20 to do -- to execute research for testifying
21 experts, primarily academicians, and that has
22 become an increasing part of our business and
23 it's now the majority.

24 Q. Have any of the surveys that you
25 either carried out or assisted in designing

1 KAPLAN

2 been rejected by a court in litigation?

3 A. To the best of my knowledge, no.

4 Q. Have any of those surveys been used
5 in Trademark Trial and Appeal Board
6 proceedings, TTAB proceedings such as we are
7 involved in today?

8 A. I believe a couple of them have.

9 Q. You have provided testimony in court
10 proceedings as you've shown in your CV,
11 correct?

12 A. Yes, I have testified, sure.

13 Q. Has any of your testimony on survey
14 topics been rejected by a court?

15 A. Never.

16 Q. Are there any texts or articles that
17 you consider to be authoritative on the area,
18 on the issues of appropriate survey design and
19 execution and standards and methodologies?

20 A. Yes, there are. There are probably
21 three that I and the colleagues I speak with
22 regard as fundamental in the area of The Manual
23 for Complex Litigation, an article entitled The
24 Reference Guide on Survey Research, which is in
25 the reference manual on scientific evidence.

1 KAPLAN

2 Q. Who authored that article?

3 A. The author was Sherry Diamond,
4 Professor Diamond, who is both a psychologist
5 and attorney and McCarthy on trademarks and
6 unfair competition.

7 I should mention, the first two, The
8 Manual for Complex Litigation and The Reference
9 Guide on Survey Research are put out by the
10 Federal Judicial Center and they provide an
11 overall framework and McCarthy is a wonderful
12 summary of the rules and cases, decisions that
13 have helped shape the rules, define the limits
14 of acceptable methodology based on various
15 decisions.

16 Q. I want to take you back to 1982
17 which I believe you said was the first time you
18 had been involved in a survey that was used in
19 litigation.

20 What was -- what was that case name
21 or what is it known as today?

22 A. I think it was Tropicana v Minute
23 Maid. It was Southern District of New York and
24 it was -- I was hired by the -- it was an
25 advertising perception study. I was hired by

1 KAPLAN

2 the defendant Tropicana to evaluate a report
3 conducted for -- evaluate research conducted
4 for Minute Maid.

5 Q. Was your testimony accepted by the
6 court?

7 A. Very definitely.

8 Q. You had mentioned Sherry Diamond and
9 her article. When is the first time you had
10 entered in any direct interaction with
11 Professor Diamond?

12 A. Sometime in the '80s. I can't tell
13 you. I'm not so good on --

14 Q. I understand. What were the
15 circumstances?

16 A. I was at an American Psychological
17 Association Convention and she presented and
18 discussed the application of psychology to the
19 law with a particular emphasis on intellectual
20 property litigation.

21 Q. How is it that you ended up having
22 an exchange with her at that point?

23 A. Oh, at that time, one of the cases
24 she cited, that she felt was -- made a point
25 that she was to make, was Tropicana.

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Q. What was the point that she was making on the Tropicana case?

A. I think the point she was making was that the initial decision found that the study that was conducted for Minute Maid, based on my comments and my reanalysis actually supported Tropicana's position. However, on appeal, as I remember it, one of the judges remarked that it was -- he wasn't really moved by the survey evidence.

He could see that there was something misleading about it and I think the point she was making was that you never can be certain, even if you do everything in a way that we all believe is right. Sometimes people hold their own opinions and that can impact an outcome.

I do believe it was further -- I think the initial judge's decision, I think, held on appeal of the appeal. They don't tell me much about that kind of stuff.

Q. You read Dr. Sabol's testimony in this case, correct?

A. Yes.

1 KAPLAN

2 Q. Do you recall his testimony about
3 never even hearing of an Eveready format
4 confusion survey before this case; do you
5 recall that testimony?

6 A. Yes.

7 Q. Had you heard of an Eveready format
8 before this case?

9 A. A long time ago, frequently.

10 Q. Can you briefly summarize for us
11 what are the defining features that are the
12 most significant characteristics of an Eveready
13 format survey?

14 A. Pleasure. First, let me say in my
15 experience in this area, litigation, likelihood
16 of confusion seems to be the legal issue where
17 surveys are used most often, probably at least
18 half the time, based on my experience and what
19 some of my colleagues say.

20 The Eveready, what is called
21 Eveready as in the battery, format was I think
22 the first time an objective survey methodology
23 was applied to address this issue. Union
24 Carbide made at that time Eveready batteries.

25 Q. I don't need to hear the facts of

1 KAPLAN

2 case. You're now starting to sound like a law
3 student citing the facts of the case. Just
4 summarize for us the defining characteristics.

5 A. The defining characteristics is that
6 you screen and qualify a person so that that
7 individual is a member of the junior user, the
8 defendant's universe of customers or target
9 universe.

10 The individual then is shown an
11 exemplar of the junior user's product or design
12 or name or what -- something that reflects what
13 is claimed to be the cause or the source of the
14 confusion. Typically it's put away, removed
15 from view, the stimulus and then the
16 interviewer asks the person several questions
17 which parallel what you find in the Lanham Act,
18 confusion. They tap into confusion as to
19 source, which is to say, who put this out.
20 Confusion as to -- I may be imprecise on the
21 terminology -- confusion as to whether there is
22 some kind of business relationship, does the
23 company that put this out, this being the first
24 product you saw, put out any other products or
25 any other brands, products under any other

1 KAPLAN

2 brand names, do they have a business
3 relationship with another company that puts out
4 this stuff and do they have a sponsorship or a
5 license or permission to put out the product or
6 use the name or use the design or whatever.

7 Those, with apologies to Senator
8 Lanham, those are the elements that are
9 defined, as I remember my reading of the Lanham
10 Act, and as it's been explained to me many
11 times by attorneys and so those are the things
12 that are -- one attempts to assess in the
13 Eveready design.

14 Q. Have you conducted --

15 A. And then to control for noise which
16 is a nice term for guessing and all kinds of
17 other extraneous considerations, a different
18 group of qualified -- of the same kinds of
19 people, are shown a different stimulus that is
20 not alleged to be infringing a source of
21 confusion and they are asked the exact same
22 questions and you look for it among them,
23 evidence of likelihood of confusion for a
24 trademark or trade dress relevant reason, that
25 is a measure of noise coming from what they

1 KAPLAN

2 call a control cell.

3 You subtract that from the measure
4 of noise you find in a test cell among the
5 people who are shown the product or stimulus
6 under, that is alleged to be causing a problem,
7 and you end up with a number, which is taken to
8 be a percentage of the universe that is
9 confused for trademark relevant reasons by
10 whatever is alleged.

11 Q. Have you performed Eveready surveys?

12 A. Oh, yeah.

13 Q. Have you switched topics now? You
14 talked about the Tropicana case being the first
15 time you were involved in litigation and in
16 that case you did a critique of an opposing
17 party's survey. Have you done that on other
18 occasions in litigation?

19 A. Yes, I have.

20 Q. When you have been asked to critique
21 an opposing side's survey, has there -- have
22 you always done or had there always then been
23 done a responsive survey as well?

24 A. Not necessarily.

25 Q. Have you been asked to do or have

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2 you recommended that there be a responsive
3 survey done?

4 A. At times.

5 Q. What is the typical form? What does
6 the typical form of a responsive or rebuttal
7 survey take in your experience?

8 A. My experience typically, what is
9 recommended is a replication of the original
10 survey using a more suitable control, either
11 the initial survey may not have a control or
12 more likely has a control which is perceived as
13 a very weak control, which means it does a poor
14 job of estimating the guessing of the noise
15 that is going on because perhaps it's not
16 particularly similar to whatever stimulus is
17 being tested.

18 What you would like to do with your
19 control is have something that is as close to
20 the alleged infringing stimulus as possible
21 without going over the line. So -- because
22 what that would enable you to do is capture all
23 the extraneous answers, all the noise, and the
24 only thing that is left, what you isolate is
25 whatever the issue is, be it the name, be it

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the color, something about the packaging, some other aspect that the plaintiff feels is apt to cause confusion.

Q. In these situations that you described as the typical rebuttal survey where you essentially kept -- as I understand, you keep the same basic survey design, but you changed the control, that the typical --

A. The stimulus, yes.

Q. Is that always the way in your experience--

A. No.

Q. -- rebuttal surveys been conducted?

A. No.

Q. What other ways have you, in your experience, seen rebuttal surveys conducted?

A. Well, speaking from my own experience, there are instances where I felt there was a very serious flaw or flaws in the study I was evaluating and serious enough so that it really did not make sense to replicate everything.

There may have been a very, very incorrect definition of the universe or really

KAPLAN

bias sampling procedure or something and so in those instances, have a discussion with the client about why I think it's appropriate that we make a change to whatever appears to be out of compliance with the guidelines and every once in a while, you're asked to evaluate, look at a study, to evaluate it and it is so fraught with problems and by problems I mean decisions that were made that do not seem to be consistent with practice and guidelines, that you really need to talk about just doing the study right because sometimes something is so bad that it is very, very hard to justify it because it's such nonsense that why replicate something that provides useless information, at least you can do the right study and help resolve the issue.

Q. And these situations where you have recommended that you not try to -- even try to replicate the original study or survey, what do you do? Do you start from scratch? What do you do?

A. Oh, yes.

Q. Thank you.

1 KAPLAN

2 A. Oh, I'm sorry.

3 Q. In situations where you have done
4 responsive or been involved in where the
5 responsive or rebuttal survey started from
6 scratch, have any of those been rejected as
7 evidence in court, to your recollection?

8 A. No.

9 Q. In this situation, based on your
10 critique, was this a situation where you could
11 do the typical type of rebuttal survey?

12 A. Well, as is not, as is sometimes
13 encountered, the study lacked the control. So
14 obvious the first thing one could do is to run
15 a control cell. However, from my perspective,
16 as I noted in my critique, the universe was
17 seriously flawed in a way that you couldn't
18 compensate for unless you redefined the
19 universe.

20 There were problems with the wording
21 and the order of some questions and I would
22 have had to redo those because they just were
23 not right. The DNA of this study was not in
24 compliance with the guidelines as I understand
25 them and cases.

1 KAPLAN

2 Q. So, in your opinion, based on your
3 critique --

4 A. I would have had to redo the study.

5 Q. Pardon?

6 A. I would have designed an appropriate
7 study. My suggestion would have been to not
8 spend time on a replication to clean up his
9 numbers because his numbers, as I concluded,
10 his numbers are worthless.

11 So there is nothing you can do to
12 rehabilitate those numbers. Even if I had
13 control, the proper control, and I made an
14 adjustment to his level of confusion,
15 everything else is so bad that it is still
16 fundamentally flawed.

17 Q. Let's begin with your critique of
18 Sabol's definition of the universe and if you
19 need to refer to his report, feel free to do it
20 or even yours. But you address, beginning on
21 page three, as I understand it, your critique
22 of Sabol's definition of the universe. How do
23 you recall that Sabol defined the universe?

24 A. My understanding was a person had to
25 have purchased a frozen entree from the frozen

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food section of a supermarket in the past 30 days and have been aware of Smart Ones based on saying yes, I've ever heard of it.

Q. So there are these two qualifications at least. What is your opinion about the appropriateness of restricting the universe to actual past purchasers?

A. I don't believe that is completely correct. I believe -- while past purchase is useful, I believe the more appropriate question is, are you likely to purchase a frozen meal, to paraphrase his wording, from the frozen food section of a supermarket in like the next 30 days.

Q. Why?

A. I believe purchase intention is a better measure than is past purchase. Past purchase deals with something that happened.

Now, the fact that I bought the item is useful, but I may have had a horrendous experience with that item such that when I get out of the intensive care unit for food poisoning, I'm unlikely to buy that again, but that doesn't show up or I might have just

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2 bought it because it was on a great sale, I
3 thought it was attractive.

4 You see all that information, the
5 purchase, and the experience with the item I
6 purchased in the past 30 days, those are all
7 integrated into my intention to purchase in the
8 future. So it's -- it is a more appropriate
9 richer criterion, I believe.

10 Q. Now, is this simply Dr. Leon Kaplan
11 on survey research methodology and standards or
12 are you aware of any others that share your
13 opinion about whether the definition of the
14 universe that Sabol used is appropriate?

15 A. I believe more and more people are
16 coming to that belief. Colleagues, when we lay
17 out questionnaires and I think even there are
18 some decisions, my belief goes back to when I
19 was in graduate school and a professor I was
20 fond of saying -- this is a serious issue in
21 marketing. You want to know the people who are
22 likely to buy your product and the people who
23 are not likely. But a professor of mine used
24 to say, "If you want to know what someone is
25 going to do, ask them." Every once in a while,

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there is a lot of truth in doing something very simple.

Q. What is your opinion about Sabol's also restricting the universe to people who were aware of the senior user's mark in this case, the mark's Smart Ones?

A. Very, very bad.

Q. Why is that?

A. In the likelihood of confusion studies that deal with forward confusion, typically the universe is defined as the junior user, Smart Balance in this case, the junior user's target market.

Based on Dr. Sabol's criteria, it would appear that Smart Balance intends to limit its market to people who are aware of Smart Ones. I didn't see -- because that's a requirement to be aware of Smart Ones. I didn't see any indication of that anywhere.

So I think by putting that particular criteria in his selection process, he has produced what is called an under inclusive universe, which is to say he has systematically excluded a group of people who

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2 we know to be purchasers of the category.

3 Q. On page five of your report, under
4 the heading sample, you address questions that
5 you say are typically asked of respondents that
6 are -- in surveys that are done for purposes of
7 litigation. Now what generally, in your
8 experience, is the standard practice regarding
9 those typical questions?

10 A. My experience, the standard practice
11 is to exclude certain kinds of people, people
12 who, by virtue of their occupation or what they
13 do for a living or their experience, may have
14 atypical perceptions of this issue.

15 Typically you would exclude someone
16 who was in a research business. Maybe you
17 would exclude someone who was involved with
18 frozen foods. The reason you do that is that
19 while those individuals obviously exist in the
20 universe, as Dr. Sabol indicated in his
21 testimony, they are usually small numbers of
22 people.

23 Now, if you have a small number of
24 people in a universe, I mean a very small
25 number, they don't exert much of an influence

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2 on the answers, but when you have a sample of
3 250, if just on chance alone you end up with,
4 for some reason, several people, a small
5 number, several people who have this atypical
6 experience that work in the business, whatever
7 the business is, et cetera, their occupation or
8 their experience, whatever can lead them to
9 look at -- to treat the interview in a
10 different manner than the general population
11 would and the issue is, when we are dealing
12 with 250 people as opposed to millions, the
13 influence of a small number of individuals
14 becomes magnified, converts into potentially
15 meaningful percentages of the sample and that
16 will affect, especially if you don't have a
17 control, for heaven's sake, that will affect
18 your outcome.

19 Q. You address the "I don't know" or
20 "Please don't guess" issues in connection with
21 Sabol's survey. What were -- what are your
22 observations and opinions concerning the way
23 the Sabol survey instrument handled the don't
24 guess, don't know issue?

25 A. Well, I think the way Dr. Sabol --

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2 the way Dr. Sabol handled it I think reflects
3 his marketing research background.

4 Q. His what?

5 A. Marketing research background and
6 his absence of litigation experience and
7 knowledge. I say that because I do both
8 marketing research and litigation research.

9 Don't knows in marketing research
10 are not really that useful and so usually we
11 try to discourage that in respondents in trying
12 to push people into positions, but don't know
13 in intellectual property litigation, is a
14 really valid answer. It is meaningful. It is
15 meaningful. So that's important.

16 We also know from a lot of social
17 science research that people usually prefer not
18 to say they don't know about things. Typically
19 it makes people feel they look not so smart and
20 in a sense, the dynamic of an interview where I
21 got an interviewer with a pen and a
22 questionnaire or whatever, that takes you back
23 to school and those kinds of -- this is a test
24 in some way.

25 I don't know the answers so -- and I

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don't want to appear stupid certainly or if they are given the incentive, they are going to pay me. I'm a nice person. I would like to help them out, whatever it is, but either way, a don't know can be perceived by the respondent as something that reflects poorly on the respondents or doesn't help the person who is conducting the interview.

So that people are reluctant to offer don't know answers. And what we do is we take pains to make clear that a don't know is a legitimate answer in a likely to confusion survey and that they shouldn't guess.

Q. What is the difference between market research surveying techniques and purposes and litigation surveys techniques and purposes that is the basis of your opinion about why it's maybe acceptable not to tell respondents don't guess in market surveys, but it is very appropriate to tell them not to guess in litigation surveys? What is the difference between the two, if any?

A. Generally speaking, marketing studies tend to describe the marketplace or an

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aspect of the marketplace. What different people drink, why different people like my brand versus another brand, how people like it differ from people who don't like it.

So they are primarily descriptive in their nature and people who don't have a clear cut decision, but have a tendency to go one way or the other, are well pushed to -- well served by moving them to one camp or the other.

Likelihood of confusion invariably is concerned about causality. The alleged, some alleged aspect or some aspect of the alleged infringer's product or service is supposed to be causing people to make an erroneous -- to come to an erroneous belief about the relationship between the alleged infringer and my product let's say. It's not descriptive. It's explanatory. It's causal and those are hugely different things.

To get to causality, we need control. We need to establish, in a perfect or in a very good study, the test product or the test stimulus and a control stimulus would differ only, only with regard to the alleged

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2 infringing aspect of the test product.

3 Q. Briefly, what is your opinion about
4 whether Sabol's survey instrument adequately
5 addressed the don't know, don't guess issue?

6 A. It didn't. It inadequately, to say
7 the least, addressed it.

8 Q. You have, since you've written your
9 report, been able to read Dr. Sabol's
10 testimony, correct?

11 A. Yes.

12 Q. Do you recall his testimony about
13 whether the -- about his opinion that the
14 Johnson survey was intentionally pushing
15 respondents towards the don't know response?
16 Do you recall that testimony generally?

17 A. Yes, I do.

18 Q. What is your opinion about whether
19 the Johnson survey instrument did that
20 inappropriately?

21 MS. GOTT: Objection to the extent
22 his opinion is not contained in his expert
23 report.

24 Q. Comment on what Dr. Sabol said,
25 please.

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2 A. I found that the criticisms that Dr.
3 Sabol raised with regards to the don't know and
4 the motivation behind that in the Johnson
5 survey were misplaced and I thought those
6 criticisms about the don't know and about it
7 causing a don't know reflect Dr. Sabol's meager
8 experience in reading in the area of likelihood
9 of confusion.

10 Q. We will get into that in a bit more
11 detail in a little bit later.

12 A. I felt he was criticizing a study
13 that was consistent with the standards,
14 certainly that part -- well, uniformly
15 consistent with the standards and very
16 specifically in the context of don't know.

17 Dr. Sabol was criticizing a study
18 where it was inappropriate. I pretty much, in
19 my work, say to respondents similar things
20 about the legitimacy of a don't know answer and
21 that they really are not supposed to guess.
22 And I don't get criticized for that.

23 Q. There was a little passage in your
24 answer that I don't think was particularly
25 clear and so I want to --

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2 A. I'm sorry.

3 Q. I want you to tell me what is your
4 opinion about how Dr. -- well, about how Phil
5 Johnson handled the don't know, don't guess
6 issue in his survey instrument?

7 MS. GOTT: Objection to the extent
8 Dr. Kaplan's opinion on Dr. Johnson's
9 survey is not contained in his expert
10 report.

11 Q. Go ahead.

12 A. He did it properly.

13 Q. Phil Johnson did it properly?

14 MS. GOTT: Objection.

15 A. Phil Johnson did it properly.

16 Q. We are going to get into a little
17 bit later into exactly why it is appropriate
18 for you to consider Dr. Sabol's testimony,
19 which you did not have before your report was
20 written, why it's appropriate for you to
21 consider his testimony in your evaluation of
22 his survey, but let's move on to Sabol's
23 question three.

24 Can you turn to his question three,
25 please? Do you have it there in front of you?

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2 A. Yes, I do.

3 Q. Can you tell us your opinion about
4 the appropriateness of his question three?

5 A. I think it's a terrible question.

6 Q. Why?

7 A. Well, it follows question two, which
8 asks respondents to name the brands of frozen
9 meals they have ever heard of, which includes
10 Smart Ones. So they are asked about Smart Ones
11 and by definition, if they don't say Smart
12 Ones, they are out of the study.

13 That was question one rather and
14 then it asks in question two if they ever
15 purchased Smart Ones. It doesn't matter
16 whether they say yes or no. They are in the
17 study. That question, even under his distorted
18 concept of what is an appropriate screening,
19 question two just doesn't belong before
20 question three, question three being his
21 version of the critical question.

22 You minimize what precedes the
23 critical question, so you don't contaminate it
24 in any way. He said if you were to see a brand
25 of frozen meals in the frozen food section of

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2 the supermarket named Smart Balance, would you
3 think it was associated with, licensed by or
4 owned by or in any way connected to Smart Ones?

5 You may answer yes, no or don't
6 know. It's the first time he mentions don't
7 know for openers so he had some awareness of
8 the relevance of it. But, for one thing, he
9 introduces the concept of or his phrase or in
10 any way connected to Smart Ones.

11 I don't know what the heck that
12 means and I don't know whether that is or is
13 not -- I don't know whether the person, the
14 respondent thinks about something that is or is
15 not covered by the law as a relevant thing and
16 then he says connected to Smart Ones. You
17 don't need to do that.

18 He can ask him if they thought it
19 was connected to any other brand and what brand
20 would that be. That would be less leading.
21 He's turned this into a closed ended question,
22 that is to say, a question that gives you the
23 opportunity to answer yes, no, don't know as
24 opposed to what we call an open-ended question,
25 which is one that would require the respondent

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to provide the name of the company that it might be associated with, licensed by, owned by or in any other way connected with it.

We know, and I believe Dr. Sabol, I can't be certain, but I think he understands that closed ended questions are more subject to guessing because I could just say yes, than an open-ended question which would require me, in this instance, to say Smart Ones. So it's -- it shouldn't be open-ended. It's got this --

Q. You said it shouldn't be open-ended?

A. I apologize. It should not be closed-ended. I'm passionate about this. It should not be closed-ended as he has it. It asks about or in any way connected to and I just don't know what that means. In addition and on that basis, I think it's fatally flawed.

In addition, it lacks a critical follow-up question which asks the respondent and why do you say that. This is a study about, as I understand it, the trade names, smart being in both of them. Now, I could answer question three yes. I think it's associated with licensed owned by or in any

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2 other way connected and think well, I don't
3 know, I'm just taking a guess.

4 We don't know the degree to which
5 that occurred here. I could say -- I'm taking
6 a guess because I don't want to appear stupid
7 because I don't want to say I don't know. I
8 could say well, this is an interview. You
9 wouldn't be asking me that question if it
10 wasn't true. So that's why I think it's the
11 case, an artifact of the questionnaire or I
12 could say well, you know, I think all this
13 stuff, all these frozen foods are made by one
14 big company. They make everything and they
15 just sell it to others who put their brand
16 names on it, price it accordingly or there may
17 be some other connection because well, you
18 know, they are both in the frozen food case of
19 the supermarket, so probably the same company
20 distributes and their person stocks the frozen
21 food area.

22 So they have some other kind of
23 connection or the person could believe it's
24 because they both have Smart Ones. The problem
25 is, there is no way to know because the person

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is never asked why do you say that. Standard.
It's inexplicable. The other part of it is by
not having the control, I can't even do an
approximation of what some of the inherent
noise would be if I had a different name.

So it suffers from the fact that I
think it's leading and ambiguous in nature and
it doesn't clarify whether the reason for a yes
answer is trademark relevant or trade name
relevant or not. Whatever numbers you get for
the aforementioned reasons are uninterpretable
and worthless.

Q. You mentioned a control. Did Dr.
Sabol have a control in his survey?

A. Absolutely not.

Q. What is your opinion about whether a
control needs to be included in likelihood or
confusion survey that is used in litigation?

A. Insofar as the survey is attempting
to show that some alleged -- something is
causing confusion, you need the control.
Insofar as you are seeking to establish a
causal relationship, you need to have a
control. This not litigation or research.

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This is science 101. This is medical research.

We don't necessarily call them controls.

We can call them placebos or something else. Unless you take account for extraneous influences on the outcome, you have a meaningless number.

Q. Do you recall Dr. Sabol's testimony about why he didn't include a control?

A. Yeah.

Q. What is your opinion about that as an explanation for omitting a control?

A. Well, there were several explanations. The first seems to be that he proposed it, but it would have meant a second cell and significant additional cost.

As I said, I believe, in my critique, if it's not worth spending the money to do it right, then it's not worth spending the money. They spent \$15,000 on worthless numbers. They could have made a contribution to a needy charity that would have been more useful.

Beyond that, Doctor, in another part of his testimony, Dr. Sabol said that I believe

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2 in his experience he usually gets small levels
3 of confusion or something in a control. I
4 don't know how he has much experience with
5 confusion because he hasn't done any of these.

6 So in a study where you have a high
7 level of, a big number, big percentage in the
8 test cell and you're going to get a small
9 level, a small number in the control cell, it
10 doesn't have a material effect.

11 Well, I do research and he does
12 research. I don't read tea leaves or anything
13 else and I assume he doesn't. I don't know how
14 you go into a study knowing that it's going to
15 be a high level of confusion and that there is
16 going to be a low level in the test cell, and
17 there is going to be a low level of confusion
18 in the control cell.

19 My suspicion is because there is so
20 much that is wrong about his questionnaire that
21 he would have a high level of confusion in his
22 control cell. So his arguments are irrelevant
23 and/or rest on certain assumptions about the
24 outcome and we do the study to learn what the
25 outcome is. We are trying not to go and

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2 assuming it.

3 Q. I want to go back to question three
4 and Dr. Sabol's criticisms concerning long
5 confusing questions. Do you recall his
6 testimony about that?

7 A. I believe he leveled that criticism
8 at question 4A in Mr. Johnson's study.

9 Q. What is your view of that criticism
10 in light of Sabol's question three?

11 A. I think they are pretty similar,
12 other than Mr. Johnson has a sequence in which
13 he handles it more appropriately
14 establishing -- requiring an open-ended answer,
15 requiring a respondent to offer Smart Ones.

16 So that it's a little bit -- I think
17 it's A, a little hypocritical. B, based on
18 what I -- having looked at the relevant portion
19 of the Lanham Act and knowing how I have
20 written this question or variations on it and
21 what I have seen in other studies,
22 Mr. Johnson's approach to this question is
23 completely consistent as I remember it with the
24 way others approach it and what the act seems
25 to ask for.

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So it's both a little hypercritical and it reflects again his lack of experience with this kind of stuff.

Q. Did Mr. Johnson have a question that asked whether there was a connection in any way between Smart Ones and the Smart Balance mark?

MS. GOTT: Objection. Beyond the scope of Dr. Kaplan's expert report.

Q. Go ahead.

A. No, I just -- no one else has done that.

Q. Because you said the questions were pretty similar and I wanted to see in which way you think Johnson's questions and question three in the Sabol report aren't similar.

A. They ask about multiple types of relationships, several. I meant the "or in any way connected." This is the first time I have seen that.

Based on my recollection, I don't know that anyone else -- I don't know that I have seen that question asked.

Q. Another question for you, you remember Dr. Sabol's testimony about how he

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2 believed his survey emulated the marketplace
3 conditions. What is your opinion about his
4 testimony in that regard?

5 A. Well, emulating the marketplace is
6 desirable in all of his research, but you have
7 to always view that in the context of what you
8 are dealing with. Now, when you lack a
9 product, physical product, when all you've got
10 are a couple of names, it's severely limiting.

11 I don't know how you can say that
12 emulating a marketplace where people are coming
13 to a store and buy is better done on a phone
14 interview. It's just not. What we try to do
15 is psychologically achieve similarities in that
16 we ask the respondent maybe to imagine they are
17 at a buying situation. So you try to get a
18 frame of mind, a frame of reference in most. I
19 think it's a bogus criticism.

20 Q. In your -- did you have -- do you
21 have any opinions about Sabol's written report
22 and the validation process?

23 A. Initially in my report I raised a
24 question about that paragraph 29, page ten.
25 Dr. Sabol does not address validation and I was

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2 concerned about that given that he didn't seem
3 to be following the guidelines in general.

4 I was concerned that he might not
5 have done an appropriate validation, if any
6 validation, in his testimony which again, I
7 didn't see until well after I finished my
8 critique.

9 He indicated that yes, he did do a
10 validation and that he always does validation
11 and that he just omitted it because it's always
12 done, but when he elaborated on what he did, it
13 was apparent that he and I and I think general
14 procedures are not in the same place vis-a-vis
15 validation. We and the majority of the people
16 I know who engage in traditional validation in
17 litigation studies always employ an independent
18 third party, which is to say, a company that is
19 not affiliated with us or with any of the
20 interviewing organizations that are involved in
21 the study to validate.

22 By validate I mean they would call
23 back each respondent a short time later and
24 attempt to confirm that the person participated
25 in the interview and also attempt to confirm

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that in our case we always try to requalify,
make sure the person met the screening
criteria, but it is always a third party, an
independent organization.

He had his supervisors apparently
dial right back to make sure the person
participated in everything else.

Q. What is your opinion about whether
Sabol's validation procedure, as best as you
can discern it, was in accordance with
generally accepted survey standards and
methods?

A. I think by doing it internally, he
fell short of the way it's typically done in
the field.

Q. Now, at the time you wrote your
report, you hadn't had Sabol's testimony. I'm
going to ask you about an additional aspect of
his testimony and that has to do with his
testimony about whether it's appropriate to
remove the stimulus from view of the respondent
before asking the substantive questions about
confusion. In your opinion, what is the
accepted procedure in that regard?

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2 A. Based on my experience, what I have
3 read, I believe the accepted procedure
4 generally is to remove the stimulus. I believe
5 that's the way it was done right from the
6 start.

7 Q. Why is that -- why is that the
8 desired procedure?

9 A. Well, when you leave the stimulus
10 sometimes that has been criticized because you
11 have turned this sort of into a reading test.
12 I read whatever it is, assuming it's a
13 trademark, trade name issue and I look at some
14 other alternatives. It's just reading.

15 Dr. Sabol classifies it as taking
16 away as a memory test because it's away and
17 then you forget about it. It's hard for me to
18 imagine that all -- that people are shown -- in
19 Mr. Johnson's case, they are shown Smart
20 Balance or Right Balance, and then it's taken
21 away and then they are asked some of the
22 questions.

23 It's difficult for me to believe
24 that memory is much of an issue. A, it's two
25 words, B, you go right into things pretty

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2 quickly. So I don't -- it's not like you're
3 being asked a couple of days later.

4 Q. In the Sabol survey, you recall how
5 the Sabol survey was conducted?

6 A. Yes, I do.

7 Q. It was done by in person?

8 A. Telephone.

9 Q. It was done by phone?

10 A. As I mentioned.

11 Q. In a phone survey a respondent who
12 is asked a question such as Sabol's question
13 three, is there any requirement that that
14 respondent call on memory?

15 A. Well, the way he structured it,
16 there isn't because he has both Smart Balance
17 and Smart Ones in the same question.

18 Q. Different question for you. When
19 the respondent answers the question, what is in
20 front of them when they do so?

21 A. Nothing. A telephone.

22 Q. Yes. Does that require them to use
23 their memory in answering the question?

24 A. Yes, absolutely.

25 MS. GOTT: Objection. Leading.

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2 Q. Thank you. So let's start from the
3 beginning since we got an objection to form.

4 What is your opinion about whether
5 doing a phone survey, such as the sort Sabol
6 conducted, requires the respondent to call on
7 memory in a similar way to which Dr. Johnson's
8 or Phil Johnson's survey did by removing the
9 stimulus when the substantive questions are
10 asked?

11 MS. GOTT: Objection. Form.

12 Q. Go ahead.

13 A. The two should both make some --
14 require a certain amount of memory, not an
15 awesome amount of memory. To not -- the way
16 you might get around that gets you into other
17 problems with potentially leading or suggestive
18 questions which you need to deal with using a
19 control, which he didn't do.

20 Q. I want to address your attention to
21 another part of Sabol's testimony and that has
22 to do with his response to your criticism in
23 paragraph 19 about his failure to have a
24 prefatory statement concerning it's appropriate
25 if you don't know an answer or have no opinion

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2 to simply say that you do not know or do not
3 have an opinion. Do you recall his testimony
4 about your criticism and why he thought your
5 criticism didn't make sense?

6 A. As I remember it, what he said was
7 that he felt my criticism was directed at
8 screener question A, which is to say, you
9 should have made it clear that if you don't
10 know, if you purchased -- whether you or anyone
11 in your household has purchased a frozen meal
12 from the frozen food section of the supermarket
13 in the past 30 days, he thought I was saying I
14 don't know should be in that.

15 Q. What were you saying?

16 A. Well, I was saying it should be in
17 that and it should be in everything. It should
18 be in have you purchased, his question,
19 screener B, have you personally purchased any
20 frozen meals from the frozen food section of
21 the supermarket in the past month/30 days.
22 Well, and he gives you a yes or a no. He
23 doesn't even have a presence of mind to give
24 you a don't know option.

25 Even in a quiet month, I would be

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2 hard pressed to remember what I had for dinner
3 three days ago or a week ago and even more hard
4 pressed to remember if I had purchased a frozen
5 meal in the past 30 days. I might and I might
6 not if they just weren't on my diet, but it's
7 not at all unreasonable if I just don't
8 remember or I don't know.

9 So my caution fits everywhere and it
10 also would be good if he even gave an option
11 for a don't know answer. If God forbid a
12 person said in screener question B, I don't
13 remember, I don't know if I purchased a frozen
14 meal from the frozen food section of the
15 supermarket in the past 30 days. What is the
16 interviewer to do?

17 Q. Could we take a short break?

18 MS. GOTT: Certainly.

19 (Time noted: 10:46 a.m.)

20 (Brief recess taken.)

21 (Time noted: 10:53 a.m.)

22 Q. We are back on the record. The
23 report which you wrote which was marked as
24 Johnson Trial Exhibit 4 was written both before
25 you had seen the Sabol trial testimony and

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before you had seen Phil Johnson's report to which some of Sabol's testimony is directed, correct?

A. Yes.

Q. Have you, since your report, read the Sabol testimony?

A. Yes.

Q. And you read the Phil Johnson survey that was addressed by Sabol and marked as an exhibit at this trial testimony, correct?

A. Yes.

Q. You have told us what your opinion was of the Sabol survey before you read his testimony. Has your opinion about the Sabol survey changed in any way after reading Sabol's testimony?

A. My opinion was that it doesn't have probative value. The numbers are meaningless. That hasn't changed at all.

Q. Has any other aspect of your opinion changed?

A. Actually, yes.

Q. In what way?

A. My perception of Dr. Sabol as an

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expert in surveys for litigation has declined.

Q. Why?

MS. GOTT: Objection.

Q. Why? Go ahead.

A. I was struck by a couple of things in his testimony. The first was acknowledgement that he had very little experience and seems to have done very little to acquaint himself with the standard references on how to do this kind of work and anything about any cases. So that he has done not very much to prepare himself as a qualified expert in this area.

I was also taken aback that when he explained or tried to explain what he did, all he did was offer opinions with usually absolutely no substantiation whatsoever and certainly nothing from the guidelines and major treatises in this area or any case law and finally, his comments about Mr. Johnson's survey, which I had not seen when I read his testimony deposition, were interesting because from what he said and from what I came away from reading Mr. Johnson's study with, it's

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2 done properly, it's done in a manner consistent
3 with what I understand to be the proper
4 procedures, guidelines on how to do a
5 likelihood of confusion study.

6 Yet, if you read in Dr. Sabol's
7 testimony, his criticisms of Mr. Johnson's
8 survey, you see that he has no understanding of
9 what you are supposed to do. He offers
10 criticisms for things that are totally
11 consistent with the way we are supposed to do
12 things, like the use of a don't know.

13 He criticizes questions that are
14 written totally consistent with the Lanham Act
15 and that go to the core of the different kinds
16 of confusion one might encounter, that account
17 for a likelihood of confusion study and on like
18 that.

19 Q. What are the factors that are to be
20 assessed in determining the admissibility of a
21 survey say concerning the qualifications of the
22 person that conduct the survey?

23 MS. GOTT: Objection. Foundation.

24 Q. Go ahead.

25 A. On page two of my report, paragraph

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2 six, I list what the guidelines from The Manual
3 for Complex Litigation identify as four factors
4 for assessing admissibility and the three
5 factors relevant for validity and of the four
6 factors, excuse me, of the factors relevant to
7 assessing validity, the second of the three is
8 whether the survey was conducted by qualified
9 persons following proper interviewing
10 procedures.

11 Q. What is your opinion about whether
12 Dr. Sabol was a qualified person?

13 MS. GOTT: Objection.

14 A. Well, since it's real clear that the
15 study did not follow proper procedures and that
16 when shown proper procedures he found them to
17 be inappropriate, he may well be okay as a
18 marketing research survey person, but I really
19 doubt that he is qualified to conduct -- it's
20 clear that he is not qualified to conduct
21 likelihood of confusion research.

22 Q. Thank you. I have no more questions
23 at this point.

24 (Time noted: 11:01 a.m.)

25 (Whereupon a discussion was held

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2 off the record.)

3 (Time noted: 11:02 a.m.)

4 EXAMINATION BY

5 MS. GOTT:

6 Q. Good morning, Dr. Kaplan. I think
7 it's still morning.

8 A. Yes, it is.

9 Q. You testified earlier that no survey
10 you have ever conducted has been rejected; is
11 that correct?

12 A. That's correct.

13 Q. Has any survey that you have
14 conducted ever been criticized?

15 A. All of them have been criticized.

16 Q. Have they ever been criticized by a
17 court or by a tribunal, such as the Trademark
18 Trial and Appeal Board?

19 A. Yes.

20 Q. You also testified that you have
21 offered testimony in one -- in one other
22 deposition in another matter that doesn't
23 appear in your CV; is that correct?

24 A. Yes, ma'am.

25 Q. Was that testimony provided for GFA

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2 brands?

3 A. No.

4 Q. What is the name of the case that
5 that testimony was provided for?

6 A. I think it's Nuance versus Abbey.

7 Q. I'm sorry, what was that?

8 A. Nuance N-U-A-N-C-E versus Abbey,
9 A-B-B-E-Y.

10 Q. And you testified as an expert in
11 that case?

12 A. Yes, I did. I was deposed. No
13 testimony.

14 Q. Is that a litigation matter in a
15 court or is that before an administrative body?

16 A. I believe it's a litigation matter
17 in the court.

18 Q. Is it a trademark case?

19 A. Yes.

20 Q. And your testimony as an expert was
21 on the issue of likelihood of confusion; is
22 that correct?

23 A. Yes.

24 Q. What other trademark is involved in
25 that case?

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MR. CROSS: Would this be subject to any kind of protective order or confidentiality issues? I doubt that the names of the marks at issue are unless you know otherwise.

THE WITNESS: I don't know.

MR. CROSS: Do you know what the marks at issue were? Do you remember what the marks at issue were?

A. Omni Reader was Nuance's product. I forgot my client's product's name.

Q. That's okay. Are you testifying then on behalf as an expert on behalf of the defendant in that case?

A. Yes.

Q. Dr. Kaplan, is it your opinion that the exclusion of persons who are not aware of Smart Ones frozen meals from Dr. Sabol's survey inflated his likelihood of confusion estimate?

A. Yes.

Q. That's because persons who are unaware of Smart Ones cannot be confused as to GFA's use of the Smart Balance trademark; isn't that correct?

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2 A. Yes.

3 Q. Persons who are unaware of Smart
4 Ones cannot be confused as to the source of
5 Smart Balance frozen meals; isn't that correct?

6 MR. CROSS: Objection to the form.

7 A. If they are not aware of it, then
8 they can't be confused.

9 Q. Persons who are unaware of Smart
10 Ones cannot be confused as to whether Smart
11 Balance is sponsored by Heinz; isn't that
12 correct?

13 A. Yes.

14 Q. Persons who are unaware of Smart
15 Ones cannot be confused as to whether Smart
16 Balance is authorized by Heinz; isn't that
17 correct?

18 A. Yes.

19 Q. Dr. Kaplan, I believe you have Dr.
20 John Sabol's survey in front of you. It's
21 Johnson Exhibit 1.

22 A. Yes, I do.

23 Q. If you need to refer to it, I'm
24 going to ask you a few questions about that.

25 Dr. Sabol's report indicates that 54

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potential respondents were disqualified because they never heard of Smart Ones, correct?

MR. CROSS: If you got a particular page.

A. Correct, page two, bottom, correct.

Q. Dr. Sabol's report indicates that those respondents accounted for 18 percent of the consumers surveyed who had purchased a frozen meal in the past 30 days, correct?

A. Yes.

Q. In other words, according to Dr. Sabol's study, 82 percent of consumers surveyed who had purchased a frozen meal in the past 30 days had heard of Smart Ones brand frozen meals, correct?

A. Aided, correct.

Q. In your report you state that the base for further calculations should have been 250 plus 54 equals 304 not 250, correct?

A. Correct.

Q. Adding in the respondents who are excluded based on awareness reduced the likelihood of confusion from 32 to 26 percent; isn't that correct?

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2 A. Correct. I showed that on page nine
3 of my report.

4 Q. You testified that you have been
5 involved in a couple of thousand surveys,
6 correct?

7 A. Yes.

8 Q. You've contributed to design of
9 approximately three quarters of those surveys;
10 is that correct?

11 A. Yes.

12 Q. In designing a survey, is it
13 possible to slants the results of that survey
14 by the way the survey is designed; isn't that
15 correct?

16 A. Yes.

17 Q. A survey could be designed so that
18 the results would show no confusion regardless
19 of how confusing the parties' marks are
20 actually in the marketplace?

21 A. Probably.

22 Q. One way to slant the results of a
23 survey is by the way the universe to be studied
24 is defined, correct?

25 A. Yes.

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2 Q. Do you have an understanding of the
3 meaning of the term over inclusive as relates
4 to the universe in a trademark survey?

5 A. I believe so.

6 Q. What is your understanding of the
7 meaning of the term over inclusive?

8 A. An over inclusive universe is a
9 universe that contains individuals who are not
10 part of the appropriate universe. Individuals
11 who do not meet the criteria for inclusion.

12 Q. A universe can be considered over
13 inclusive if it includes individuals who states
14 of mind are not relevant to the legal issues
15 being studied; isn't that correct?

16 A. Yes.

17 Q. In general, would you expect that an
18 over inclusive universe would decrease the
19 likelihood that a survey would have results
20 tending to show confusion; is that correct?

21 A. Yes, I think.

22 Q. An over inclusive universe can
23 sometimes be less of a problem than an under
24 inclusive universe; is that correct?

25 MR. CROSS: Objection. Incomplete

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2 hypothetical.

3 A. Yes.

4 Q. That's because sometimes you can
5 back out respondents that have been over
6 included if you have appropriate screening
7 questions; isn't that correct?

8 A. Yes.

9 Q. What is the value of the results of
10 a survey based on an over inclusive universe
11 where the responses from the over included
12 respondents cannot be backed out?

13 A. That depends.

14 Q. What does it depend on?

15 A. What percentage of the total sample
16 would be from the over inclusive portion of the
17 universe and whether or not the states of mind
18 of the individuals who are in what we will call
19 the over inclusive part of the universe or
20 similar or dissimilar from the states of mind
21 of the people who rightfully belong in the
22 universe.

23 Q. But if the study does not contain
24 appropriate screening questions upon which you
25 can identify the percentage of the respondents

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2 that were over included, what value would that
3 survey have?

4 A. As I said, it depends. If the over
5 inclusive universe is a real small segment
6 of -- it is very small in comparison to the
7 appropriate universe. So that we have maybe a
8 couple of people and a sample of several
9 hundred, then it likely might not have very
10 much of an effect.

11 If the over inclusive universe, the
12 members of that had similar relevant beliefs
13 about whatever we were studying, then their
14 inclusion wouldn't necessarily compromise
15 anything.

16 Q. How would you be able to determine
17 what percentage of respondents were over
18 included?

19 A. It depends on your screener.

20 Q. And if you didn't have a screening
21 question that addressed the distinction between
22 the over included respondents and the
23 appropriate universe, there would be no way to
24 determine what percentage of respondents were
25 over included; is that correct?

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2 A. Yes.

3 Q. In evaluating the results of a
4 likelihood of confusion survey, don't know
5 responses generally count the same as a
6 negative response, correct?

7 A. Yes.

8 Q. In other words, don't know responses
9 on the ultimate issue do not support a
10 likelihood of confusion, correct?

11 A. Yes.

12 Q. Another way to slant the results of
13 a survey would be to ask questions that suggest
14 don't know responses; isn't that correct?

15 A. Yes.

16 Q. Dr. Kaplan --

17 A. Let me amend that.

18 Q. Sure.

19 A. Could you restate that? I may have
20 answered too quickly. Could you ask your
21 question again, please?

22 Q. I believe the question I asked you
23 was another way to slant the results of a
24 survey would be to ask questions that suggest
25 don't know responses; isn't that correct?

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2 A. I'm sorry, yes.

3 Q. Dr. Kaplan, do you have an
4 understanding of what the term full filters
5 means with respect to a study or survey?

6 A. Yes.

7 Q. What does that term mean?

8 A. The term that is used by Professor
9 Diamond and -- it relates to the way -- it
10 relates to questions that are sometimes called
11 gatekeeper questions. For example, using Dr.
12 Sabol's question three, I might precede that
13 with his question one asking in an open-ended
14 manner have you ever heard of blah, blah, blah.

15 Question one would be a gatekeeper
16 in that if you don't mention Smart Ones, I
17 wouldn't ask question three. Similarly,
18 question one, which he uses as in effect a
19 gatekeeper to get into the whole study is a
20 filtering question to use a terminology you
21 pose.

22 If you said you had -- if you
23 indicated that you had never heard of Smart
24 Ones, however we assess that, I wouldn't ask
25 you if you ever purchased it.

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2 It is a filtering question. No, I
3 never purchased it. In the sense that no, I
4 never heard of it filters me out of questions
5 like have you ever heard of it.

6 Q. Do you have an understanding of what
7 the term quasi filters means with respect to a
8 study or survey?

9 A. If I don't get them confused, a
10 quasi filter is -- again, it relates to the
11 gatekeeper role of a question that either
12 allows you to be asked subsequent questions or
13 not be asked that subsequent question as being
14 filtered out or gatekeeper.

15 I prefer not to venture a guess on
16 exactly what the two mean at the moment. I
17 don't use her terminology in that regard much.

18 Q. Is it -- you have some understanding
19 of what those terms mean though, right? You
20 have seen her use them, correct?

21 A. Yes.

22 Q. And both terms, in your
23 understanding, are used to screen or filter out
24 respondents; is that correct?

25 A. Filter or qualify, yes, that is

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2 correct.

3 Q. In screening or qualifying, when we
4 are talking about full filter or quasi filter
5 questions, those are questions that generally
6 offer don't know or no opinion options to
7 respondents as part of a set of response
8 alternatives, correct?

9 A. Typically they do.

10 Q. Are you aware that recent research
11 on the effects of including a don't know option
12 shows that quasi filters, as well as full
13 filters, may discourage a respondent who would
14 be able to provide meaningful answers from
15 expressing it?

16 A. Yes.

17 Q. The don't know option provides a cue
18 to respondents that it's acceptable to avoid
19 the work of trying to provide a more
20 substantive response; isn't that correct?

21 A. Would you repeat that?

22 Q. The don't know option provides a cue
23 to respondents that it is acceptable to avoid
24 the work of trying to provide a more
25 substantive response; isn't that correct?

1 KAPLAN

2 A. Not necessarily at all. The don't
3 know option makes clear to the respondents, as
4 I have said in this other study, that don't
5 know is a legitimate answer.

6 Q. The don't know response is a
7 legitimate answer, however, are you aware of
8 research that indicates that it provides a cue
9 to respondents that answering in that manner is
10 an acceptable way to avoid the work of trying
11 to provide answers to follow-up questions?

12 MR. CROSS: Asked and answered.

13 Objection.

14 A. You are presuming that the
15 respondent is aware that there are follow-up
16 questions. I don't -- the respondent does not
17 necessarily know that and you're presuming that
18 that is quote "extra work" closed quote.

19 So I understand what you are talking
20 about, but that statement taken in the abstract
21 doesn't fit.

22 Q. Is that a criticism of providing a
23 don't know option of a response that you're
24 aware of? Have you heard of that criticism
25 previously?

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2 A. Not that I remember.

3 Q. Dr. Kaplan, you did not conduct your
4 own study or survey in this case; is that
5 correct?

6 A. Yes, ma'am, that's correct.

7 Q. But a study or survey was conducted
8 in this case on behalf of your client, correct?

9 A. Yes.

10 Q. Do you have any thoughts as to why
11 you were not asked to conduct a rebuttal survey
12 in this case?

13 MR. CROSS: Objection. I ask you
14 not to speculate.

15 A. No idea. Oversight on their part.

16 MR. CROSS: Pardon me?

17 A. I'm not talking to you. I said it
18 was an oversight. I have no idea.

19 Q. Let's assume you had been asked to
20 conduct a rebuttal survey in this case, how
21 would you have gone about conducting the
22 rebuttal survey?

23 A. You know, I wasn't asked to do a
24 rebuttal survey and I really had my hands full
25 critiquing everything that Dr. Sabol did that

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was wrong. I never -- honestly, I never really dealt with the issue of what I would do because I would have had to design a new study and that usually takes a fair amount of time and effort.

Q. One of the criticisms that you have of Dr. Sabol's study is that he did not use an appropriate universe; is that correct?

A. Yes, ma'am.

Q. How would you have defined the appropriate universe in this case?

A. I would have defined the appropriate universe as Mr. Johnson did. I would have been interested in prospective purchasers of -- I would have defined it as the junior users universe, which as I understand it, are prospective purchasers of frozen meals, people who are likely to purchase in the next 30 days and potentially people who have purchased in the past 30.

Q. As to future purchasers, you indicated that experience with the purchase is integrated into the intention to purchase in the future; is that correct?

A. That's a theory.

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2 Q. You cited some examples earlier in
3 which someone's experience with a purchase
4 would drive their future purchasing behavior;
5 didn't you?

6 A. Yes, I did.

7 Q. The examples that you cited I
8 believe they were if someone ended up in the
9 hospital as a result of the product that they
10 purchased or perhaps that that product was just
11 purchased because it was on sale. In both of
12 those circumstances, their purchase experience
13 would be detrimental to the senior user,
14 correct, whether they would purchase in the
15 future?

16 A. If the -- it would be -- if the
17 question was have you purchased any frozen
18 foods from the frozen food section of a
19 supermarket in the past 30 days, if you had and
20 you had a negative experience, and you had good
21 memory, it would likely be detrimental to the
22 entity that put out the meal, which is not
23 necessarily the senior user, and it might be
24 detrimental to the overall category. So the
25 answer is a big maybe.

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2 Q. You testified that you would define
3 the appropriate universe in this case as
4 prospective purchasers, the junior user's
5 universe, prospective purchasers of frozen
6 meals; is that correct?

7 A. Yes.

8 Q. Dr. Kaplan, are you familiar with
9 the varieties of frozen meal products on the
10 market?

11 A. Some.

12 Q. Are you familiar with Hungry-Man
13 frozen meal products?

14 A. No.

15 Q. Are you familiar with Swanson frozen
16 meal products?

17 A. No.

18 Q. Are you familiar with Stouffers
19 frozen meal products?

20 A. Yes.

21 Q. Are you familiar with Marie
22 Callender's frozen meal products?

23 A. Yes.

24 Q. What other frozen meal products are
25 you familiar with?

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2 A. Lean Cuisine, Banquet. Nothing else
3 comes to mind.

4 Q. Stouffers frozen meal products and
5 Banquet frozen meal products are generally high
6 in fat; isn't that correct?

7 A. No idea.

8 Q. Stouffers frozen meal products and
9 Banquet frozen meals are generally high in
10 calories; isn't that correct?

11 A. I really don't know.

12 Q. Stouffers frozen meal products and
13 Banquet frozen meal products are generally high
14 in sodium; isn't that correct?

15 A. I don't know.

16 Q. Stouffers frozen meal products and
17 Banquet frozen meal products are generally not
18 made with whole grains; isn't that correct?

19 A. I have no idea.

20 Q. Stouffers frozen meal products and
21 Banquet frozen meal products are generally not
22 low carbohydrate; isn't that correct?

23 A. I don't know.

24 Q. Stouffers frozen meal products and
25 Banquet frozen meal products are generally not

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2 healthful products; isn't that correct?

3 A. I have no idea. I never thought of
4 them that way.

5 Q. In your opinion, would Stouffers
6 frozen meal products be healthful foods?

7 MR. CROSS: Objection. Lack of
8 foundation.

9 A. I'm sorry. I have no idea.

10 Q. Stouffers frozen meal products and
11 Banquet frozen meal products generally aren't
12 the type of frozen meals one would purchase if
13 one was trying to lose weight; isn't that
14 correct?

15 A. I don't know.

16 Q. You mentioned that you are aware or
17 familiar of Lean Cuisine frozen meal products;
18 is that correct?

19 A. Yes.

20 Q. Is Lean Cuisine frozen meal products
21 generally the type of frozen meals one would
22 purchase if one was trying to lose weight?

23 A. Based on the name, I would think so.

24 Q. You're familiar -- are you familiar
25 with Smart Ones frozen meal products?

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2 A. No, I'm not.

3 Q. So you're not familiar with who the
4 target market is for Smart Ones frozen meal
5 products; is that correct?

6 A. Dr. Sabol, I think, talked about it
7 and it would be people who -- I think who buy
8 frozen meals in the frozen food section of the
9 supermarket. That's what he screened for.
10 That was one of his screens.

11 Q. Stouffers frozen meal products and
12 Banquet frozen meal products generally aren't
13 the type of frozen meals one would purchase if
14 one were trying to improve one's cholesterol
15 levels; isn't that correct?

16 A. I have no idea.

17 Q. Stouffers frozen meals and Banquet
18 frozen meal products generally aren't the type
19 of frozen meals one would purchase if one were
20 trying to maintain a healthy lifestyle; isn't
21 that correct?

22 A. I don't know.

23 Q. In considering the appropriate
24 survey universe in this case, is it helpful to
25 have an understanding of the junior user's

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2 products that they intend to offer?

3 A. Yes.

4 Q. Do you have an understanding of the
5 products that Smart Ones intends to offer that
6 are at issue in this case?

7 A. I believe so.

8 MS. GOTT: Can you read back my
9 question, please?

10 (Whereupon the record was read back
11 by the reporter.)

12 Q. I misspoke. I am sorry. I meant to
13 ask you if you have an understanding of the
14 product that Smart Balance tends to offer that
15 are at issue in this case?

16 A. I think so.

17 Q. Do you have an understanding of the
18 products that are currently offered by Smart
19 Balance?

20 A. Yeah.

21 Q. You mentioned earlier that --

22 A. Yes.

23 Q. You mentioned earlier that the name
24 Lean Cuisine suggests something about those
25 products, that they are healthful or that they

1 KAPLAN

2 are intended to help someone maintain their
3 weight; is that correct?

4 A. I didn't say that. I don't believe
5 I said healthful. I infer from the lean in
6 Lean Cuisine that it relates to something about
7 maintaining losing weight, something like that.

8 Q. Is there anything that you would
9 infer from the name Smart Balance?

10 A. That it is a balance between -- some
11 considerations in whatever the food they are
12 talking about.

13 Q. Are you aware that Smart Balance
14 products do not contain hydrogenated or
15 partially hydrogenated oils?

16 A. No.

17 Q. Are you aware that Smart Balance
18 products are naturally 0 grams trans fat?

19 A. No, I never thought about it.

20 Q. Are you aware that many Smart
21 Balance products are designed to improve
22 consumer's cholesterol ratios?

23 A. No.

24 Q. Are you aware that many Smart
25 Balance products have added vitamins and

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2 nutrients?

3 A. No, I didn't know that.

4 Q. You understand that GAF brands
5 intended to introduce a line of frozen entrees
6 under the Smart Balance brand; is that correct?

7 A. That's my understanding.

8 Q. Assuming the Smart Balance products
9 do not contain hydrogenated or partially
10 hydrogenated oils, that they are naturally
11 0 grams trans fats and that they are designed
12 to improve consumers' cholesterol ratios, would
13 you consider that to be a nutritional product?

14 A. I consider that to be a healthful
15 product. We haven't discussed vitamins or
16 minerals or that kind of stuff.

17 Q. So those things that I mentioned,
18 the hydrogenated oils, trans fats, cholesterol
19 ratios, those are generally things that would
20 indicate a healthful product; is that correct?

21 A. To me.

22 Q. Do you have an understanding as to
23 whether the frozen entrees, the GAF brands
24 tends to introduce under the Smart Balance
25 brand are likely to be healthful frozen

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2 entrees?

3 A. I don't know. No.

4 Q. I believe you testified that you're
5 not familiar with Smart Ones frozen entrees; is
6 that correct?

7 A. I believe that I did testify to that
8 effect.

9 Q. So you're not aware that Smart Ones
10 frozen entrees are generally healthful
11 products, correct?

12 A. I actually don't know.

13 Q. You don't know if you're aware?

14 A. I actually don't know if they are or
15 aren't, what I think on the subject.

16 Q. So then you're not aware?

17 A. I guess, yeah, I'm sorry.

18 Q. And you're not aware that Smart Ones
19 frozen entrees are generally low in fat,
20 correct?

21 A. Let me say I don't specifically know
22 that. There is -- they have some relationship
23 with Weight Watchers which I'm -- I don't have
24 all particulars on, that suggests to me that
25 they would be low in fat.

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2 Q. Are you aware that Smart Ones frozen
3 entrees are generally high in fiber?

4 A. No, no.

5 Q. Are you aware that Smart Ones frozen
6 entrees are generally high in protein?

7 A. No.

8 Q. Are you aware that many Smart Ones
9 frozen entrees contain whole grains, fruits and
10 vegetables?

11 A. No.

12 Q. Smart Balance frozen meals and Smart
13 Ones frozen meals are likely to be sold in the
14 same channels of trade; isn't that correct?

15 A. It's my understanding, yes.

16 Q. Both Smart Balance frozen meals and
17 Smart Ones frozen meals would likely be sold in
18 grocery stores, correct?

19 A. Yes.

20 Q. Both Smart Balance frozen meals and
21 Smart Ones frozen meals would likely be sold in
22 mass merchandisers, correct?

23 A. I don't know.

24 Q. Both Smart Balance frozen meals and
25 Smart Ones frozen meals would likely be sold

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2 wherever frozen food products are sold; isn't
3 that correct?

4 A. I hope so.

5 Q. Smart Balance frozen meals would be
6 located in the same area of the grocery store
7 as Smart Ones frozen meals; isn't that correct?

8 A. I would expect that to be the case.

9 Q. Smart Balance frozen meals would
10 likely be displayed in close proximity to Smart
11 Ones frozen meals in the grocery store; isn't
12 that correct?

13 MR. CROSS: Objection to form.

14 A. I don't know, but I would expect
15 that to be the case.

16 Q. Frozen meal products are necessarily
17 located in the freezer section of a store,
18 correct?

19 A. Yes.

20 Q. Smart Balance frozen meals could be
21 displayed in the same freezer aisle as Smart
22 One frozen meals; isn't that correct?

23 A. Certainly could.

24 Q. Smart Balance frozen meals could
25 even be displayed in the same freezer case as

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2 Smart Ones frozen meals; isn't that correct?

3 A. Could be.

4 Q. Smart Balance frozen meals are
5 likely to compete with Smart Ones frozen meals;
6 isn't that correct?

7 A. Could be.

8 Q. Consumers may encounter Smart
9 Balance frozen meals a short time after seeing
10 Smart Ones frozen meals or vice versa; isn't
11 that correct?

12 A. It could be.

13 Q. Dr. Kaplan, would you agree with me
14 that when surveys are used to prove the state
15 of mind of a prospective purchaser, the closer
16 the survey methods mirror the situation in
17 which the ordinary person would encounter the
18 trademark, the more reliable the survey?

19 A. Assuming everything else is the
20 same, what we tend to strive for is, at a
21 minimum, to establish a psychological
22 representativeness. By that I mean carrying
23 the notion of similarity to the marketplace
24 would say well, we should be setting up a
25 psuedo, in this case psuedo frozen food aisles

1 KAPLAN

2 and frozen food displays, and that may be just
3 too much and that would serve to disqualify the
4 phone as a way to collect data, but it should
5 not be interpreted literally.

6 When you try to conjure up a
7 psychological representation of the
8 marketplace, it can mean to try to put the
9 person in a buying frame of mind, assuming you
10 were shopping for, et cetera. Given that more
11 complete explanation of how I see it, the
12 answer is yes.

13 Q. So a survey in your opinion does not
14 need to literally mirror the marketplace
15 conditions; it's the psychological aspects that
16 should be mirrored?

17 A. Thank you. That's well stated or
18 emulated.

19 Q. Through your experience conducting
20 surveys and market research to assess the
21 likelihood of confusion, you have become
22 familiar with the generally accepted practices
23 of conducting such research; is that correct?

24 A. Likelihood of confusion is not
25 marketing research. It's litigation research,

1 KAPLAN

2 but yeah, I believe so.

3 Q. So you've never conducted market
4 research to assess likelihood of confusion; is
5 that your testimony?

6 MR. CROSS: Objection to form.

7 A. To my knowledge, every likelihood of
8 confusion study was not done for the -- for
9 marketing research purposes only.

10 Q. In assessing likelihood of
11 confusion, it is important to consider data
12 gleaned from actual consumers, correct?

13 A. From potential consumers, yes,
14 that's who you have to gather data from,
15 relevant consumers.

16 Q. In gathering data from the relevant
17 consumers, prospective purchasers, is it
18 important to consider how many of those
19 prospective purchasers are actual customers?

20 A. Could you clarify that? I'm sorry.

21 Q. If you're assessing a likelihood of
22 confusion involving prospective purchasers, is
23 it useful to know how many of those prospective
24 purchasers have purchased the product being
25 surveyed in the past?

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2 A. Sure, that can be useful.

3 Q. And generally you're surveying the
4 junior user's product, the effect of the junior
5 user's product on the market, correct?

6 A. Yes.

7 Q. In a forward confusion case?

8 A. Yes.

9 Q. In a reverse confusion case, what
10 market do you study?

11 A. In a reverse confusion case, you
12 typically would study the senior users target
13 market.

14 Q. In a reverse confusion case, when
15 you're studying the senior users market, is it
16 useful to know how many of those respondents
17 actually purchased the senior users product?

18 A. That's the same question you asked
19 before. That's useful in the earlier context,
20 yes, it's useful.

21 Q. Would you agree with me that when
22 assessing the likelihood that a junior user's
23 mark will cause confusion in the marketplace,
24 it's a generally accepted practice to consider
25 how many of the respondents are aware of the

1 KAPLAN

2 senior user's mark?

3 A. Could you repeat that question,
4 please?

5 Q. Sure. Would you agree with me that
6 when assessing the likelihood that a junior
7 user's mark will cause confusion in the
8 marketplace, it is a generally accepted
9 practice to consider how many of the
10 respondents are aware of the senior user's
11 mark?

12 A. What do you mean by consider?

13 Q. To include a screening question to
14 identify how many of the respondents are aware
15 of the senior user's mark?

16 A. Not necessarily at all. In fact,
17 there are times that it actually could be a
18 source of bias by mentioning the name of a
19 senior user's product.

20 If we were to follow the traditional
21 Eveready design where I would be asking about
22 the junior user, it would be undesirable to
23 have previously discussed the senior user.

24 Q. What about after you have asked the
25 key question and likelihood of confusion, would

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2 it be a generally accepted practice or is it a
3 generally accepted practice to consider how
4 many of the respondents are aware of the senior
5 user's mark after?

6 A. I don't know that it's generally
7 accepted practice, but if you are interested in
8 that, then that's the place to ask the
9 question. There are some studies where you
10 would do something like that, ask about
11 awareness or ask about some other consideration
12 after the fact, after the key questions are
13 asked and actually use that as what is called a
14 post hoc screen.

15 Q. Including what you called a post hoc
16 screen would be a way to filter out potentially
17 over inclusive respondents from the universe of
18 a survey, correct?

19 A. Exactly.

20 Q. When conducting a likelihood of
21 confusion survey, you testified that the
22 respondents are shown a stimulus; is that
23 correct?

24 A. They are shown, as was the case with
25 Dr. Sabol, they could be told about -- they are

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2 exposed to stimulus.

3 Q. In a mall intercept survey generally
4 the respondents are shown a stimulus, correct?

5 A. Not necessarily. That depends on
6 what the study is about. I have the advantage
7 in a mall intercept of being able to show
8 people something, but if that's not the
9 purpose, for whatever the reason, I may prefer
10 to tell them about or let them read something
11 about, but I want to use the mall for whatever
12 the reason.

13 Q. Assuming you have shown the
14 respondents a stimulus in a mall intercept
15 survey, you testified that typically you put
16 the stimulus away after showing it to them; is
17 that correct?

18 A. That's correct.

19 Q. But there are situations in which
20 you would leave the stimulus out; isn't that
21 correct?

22 A. Probably. I can't think of any
23 offhand, but I wouldn't rule out that. I would
24 have to see something.

25 Q. Have you conducted any mall

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intercept surveys where you showed the respondents a stimulus and then left that stimulus out as you asked them questions about the stimulus?

A. As we sit here, I can't think of one.

Q. You served as an expert witness in a case involving Cristal Champagne; is that correct?

A. That is correct.

Q. In that case you conducted a mall intercept survey; is that correct?

A. That is correct.

Q. In that survey you showed respondents the bottle of Cristal Champagne, correct?

A. Yes, ma'am.

Q. In that survey did you ask the respondents whether they were familiar with the Cristal Champagne?

A. I asked them if they had seen or heard of it prior to my showing them.

Q. In that case Cristal was the senior user; is that correct?

1 KAPLAN

2 A. Yes.

3 Q. After you showed them the Cristal
4 Champagne, you showed them the junior user's
5 product, correct?

6 A. I showed them an array of four
7 products in the test cell. Junior user's
8 product was one of the four.

9 Q. Was the senior user's product, the
10 Cristal Champagne, one of the four in the
11 array?

12 A. No, in the subsequent array, no, it
13 was not.

14 Q. If the respondents testify that they
15 were not aware of or familiar with Cristal
16 Champagne upon being shown the stimulus, did
17 you remove the Cristal Champagne in that
18 survey?

19 A. I removed the Cristal Champagne
20 regardless of whether the respondent was or was
21 not aware of it previously.

22 Q. It's not improper then to expose the
23 respondents to the senior user's mark or
24 product in conducting a likelihood of confusion
25 survey; is that correct?

1 KAPLAN

2 MR. CROSS: Objection. Incomplete
3 hypothetical.

4 A. It always depends, as it does in
5 every piece of research for litigation or
6 otherwise, on the specifics of the product or
7 the market situation. So it depends.

8 Q. But you, yourself, have conducted
9 surveys in which the senior user's mark or
10 product was shown to the respondents prior to
11 asking them about the ultimate issue, correct?

12 A. I have done that and to the best of
13 my knowledge, I have removed the senior's
14 user's product from view and I typically ask
15 some questions that serve as a distracter kind
16 of function between the exposure to the senior
17 user's product and the subsequent array or
18 exposure to the junior user's product or the
19 control product.

20 Q. What is the purpose of distracter
21 questions?

22 A. What you want to try -- again, this
23 goes to the notion of the psychological
24 representativeness, psychological similarity to
25 the marketplace. What you want to do is to the

KAPLAN

degree you can, you want to change the respondents' train of thought. You want to distract them. You want to -- so we are not going from here is the senior user's product without identifying it as such to boom, here is the junior user's.

What I am, and many others do, is insert the task which is usually some questions that hopefully will get the respondent thinking about something else and distract them, break their train of thought.

Q. So one reason to ask those types of questions is to avoid the respondents trying to anticipate what the correct answer is on the ultimate questions; is that correct?

A. No, no, from my perspective they don't know what is coming up or anything. The purpose is to break a train of thought so that -- as happens in the real world, there is a certain amount of memory here -- be it for a few seconds or a small amount of time, whatever that is involved. I don't want you necessarily to have two things in front of you at once that might make this a visual comparison, given

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everything else that goes on in the survey, the other characteristics of the interview, I want to make it a little less obvious to the respondent.

MR. CROSS: Why don't we take a short break.

(Time noted: 12:02 p.m.)

(Brief recess taken.)

(Time noted: 12:10 p.m.)

Q. Dr. Kaplan, you testified earlier that you've conducted numerous surveys in your career, correct?

A. Yes.

Q. Have you ever conducted a survey or a study to assess whether a mark is famous?

MR. CROSS: Objection to the extent fame is a legal term with a legal definition, but go ahead.

A. Yes.

Q. Dr. Kaplan, are you familiar with what the term famous means in connection with the Lanham Act?

A. Generally, yes.

Q. What is your understanding of what

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2 the term famous means?

3 A. That the mark is known by a majority
4 of the people or something in that range, that
5 it's -- a mark is known to -- the mark is known
6 far and wide.

7 Q. And you just testified that you've
8 conducted surveys or studies to assess whether
9 a mark is famous, correct?

10 A. What I did do actually is I
11 conducted a study once or twice, someone else
12 did design it, but as usual I share in that
13 process, so I have done some.

14 Q. What types of questions do you ask
15 in those kinds of studies?

16 A. I only got two data points and it's
17 a long time ago. I'm sorry, I don't remember.

18 Q. Ultimately in those kinds of
19 studies, you're trying to assess the degree of
20 awareness of that particular mark in the
21 marketplace, correct?

22 A. Yes.

23 Q. Would you agree with me that Smart
24 Ones is a famous mark?

25 A. No idea.

1 KAPLAN

2 Q. You're not familiar with the
3 majority of trademark cases involving fame,
4 correct?

5 A. That is correct.

6 Q. You do not know whether the results
7 of an aided awareness question have been used
8 to support a claim of fame, correct?

9 A. Correct.

10 Q. You do not know whether the results
11 of an aided ever purchased question have been
12 used to support a claim of fame, correct?

13 A. Correct.

14 Q. Because you are not familiar with
15 the majority of trademark cases involving fame,
16 you cannot tell me, as you sit here today,
17 whether the questions asked in Dr. Sabol's
18 survey concerning the famousness of the Smart
19 Ones brand were right or wrong; isn't that
20 correct?

21 A. As I said in my report, to my
22 knowledge I was not aware of a fame claim being
23 based on aided awareness questions, but I did
24 not -- I hope I did not hold myself out as an
25 expert on fame, if that answers your question.

1 KAPLAN

2 Q. So again you can't tell me, as
3 you're sitting here today, whether the
4 questions asked in Dr. Sabol's survey were
5 right or wrong; is that correct?

6 A. Only to the extent that I was not
7 familiar with aided questions, which is what he
8 asked, being used in and most purchase or
9 whatever questions he asked being used to
10 substantiate it. So I'm not familiar with them
11 being used and, therefore, I can't tell you
12 whether they are right or wrong.

13 Q. As an expert on likelihood of
14 confusion surveys, you're familiar with both
15 the Eveready survey format and the Squirt
16 survey format, correct?

17 A. Yes, ma'am.

18 Q. The Eveready survey format is
19 especially appropriate when the senior mark is
20 strong and widely recognized, correct?

21 A. I don't know that it is especially
22 appropriate necessarily. The Eveready design
23 is the -- in effect, the senior design, as it
24 were, in likelihood of confusion, and it is
25 famous and well respected among people who do

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2 this kind of stuff.

3 Q. You testified earlier that McCarthy
4 on Trademarks is an authoritative text in the
5 area of likelihood of confusion surveys and
6 trademark lines in general; is that correct?

7 A. Among other things, yes, ma'am.

8 Q. So if it appears in Mr. McCarthy's
9 treatise that the Eveready format is especially
10 appropriate when the senior mark is strong and
11 widely recognized, you have no reason to
12 dispute that, do you?

13 A. Oh, for sure. I just don't remember
14 reading it there. I could have forgotten. I
15 would agree with that.

16 Q. Would you agree with me that Smart
17 Ones is a strong mark?

18 A. I don't know.

19 Q. And the reason you don't know is
20 because you have not done any studies to
21 determine the strength of the Smart Ones' mark;
22 is that correct?

23 A. That and we should define what we
24 mean by strong.

25 Q. What is your understanding of the

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2 term strong?

3 A. I don't have a singular
4 understanding. It could be a high level of
5 awareness. It could be a high level of
6 intention to repurchase that particular brand.
7 It could be favorable feelings towards it. I
8 don't think there -- to my knowledge, there is
9 not a one to one relationship between what a
10 strong mark means. For all I know, it's all of
11 the above.

12 Q. So one way to define a strong brand
13 may be one that is known to many people,
14 correct?

15 A. Certainly could be.

16 Q. If more than 75 percent of
17 respondents in a survey indicated awareness of
18 a particular brand, would you agree that that
19 is a high level awareness?

20 A. I would think that's a high level of
21 awareness. It depends on the people we are
22 asking. If we are asking people who work for
23 the company, then that would be shaky, but
24 depending on your universe, that would be a
25 high level of awareness.

1 KAPLAN

2 Q. Would a 75 percent level of
3 awareness result signify to you that the brand
4 is a strong brand if strength is meant by the
5 level of awareness?

6 MR. CROSS: Objection. Incomplete
7 hypothetical.

8 A. If you define strong as the level of
9 awareness in a 75 percent awareness, which is a
10 high level of awareness, I believe it would
11 mean a strong brand.

12 Q. Would you agree with me that Smart
13 Ones is a widely recognized brand?

14 A. I don't know.

15 Q. Why don't you know?

16 A. Because I never researched it.

17 Q. Before this proceeding, before you
18 were involved as an expert, had you heard of
19 Smart Ones?

20 A. I was aware, I think, of the brand
21 name, but you know, I didn't associate it with
22 anything. To my knowledge, I never consumed
23 any of their frozen foods.

24 Q. Dr. Kaplan, you didn't conduct any
25 surveys or market research in connection with

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2 this proceeding, did you?

3 A. That's correct, I did not.

4 Q. No one in your company conducted any
5 surveys or market research in connection with
6 this proceeding; did they?

7 A. That is correct. They did not.

8 Q. No one conducted any surveys or
9 market research in this proceeding at your
10 direction, did they?

11 A. No.

12 Q. No one conducted any surveys or
13 market research in connection with this
14 proceeding under your supervision, did they?

15 A. No.

16 Q. You were not involved in designing
17 or implementing Mr. Johnson's survey in this
18 case, correct?

19 A. No.

20 Q. Have you ever conducted any consumer
21 surveys or market research involving the Smart
22 Balance mark?

23 A. No.

24 Q. Have you ever conducted any consumer
25 surveys or market research involving any marks

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2 that included the term Smart?

3 A. Not to my knowledge.

4 Q. Dr. Kaplan, have you ever heard of a
5 company called Ipsos, I-P-S-O-S?

6 A. Yes.

7 Q. Ipsos is an internationally
8 recognized market research company; is it not?

9 A. Yes.

10 Q. Isn't it true that Ipsos has a good
11 reputation, among others in the market research
12 industry, for the quality of its research?

13 A. I don't know.

14 Q. Have you had an opportunity to
15 review any research conducted by Ipsos?

16 A. What I did do was when I read Dr.
17 Sabol's testimony, I believe he recited some
18 research done for Smart Ones by Ipsos, I
19 believe.

20 Q. Your company provides market
21 research studies, correct?

22 A. Correct.

23 Q. Do you consider Ipsos to be a
24 competitor of yours?

25 A. Not really.

1 KAPLAN

2 Q. Do you have clients that use Ipsos,
3 to your knowledge?

4 A. I have no idea.

5 Q. Have you heard any negative
6 information in the industry about Ipsos?

7 A. Never.

8 Q. Have you heard positive information
9 in the industry about Ipsos?

10 A. Not that I remember.

11 Q. Dr. Kaplan, there are a number of
12 legal citations in your report; isn't that
13 correct?

14 A. Yes.

15 Q. Your critique of Dr. Johnson's
16 work -- excuse me, Dr. Sabol's work is not the
17 first critique you've done; is that correct?

18 A. That's correct.

19 Q. You've read the case as cited in
20 your report; is that correct?

21 A. Yes.

22 Q. And no one directed you to the cases
23 cited in your report?

24 A. No.

25 Q. Please direct your attention to page

1 KAPLAN

2 four of your report. At the top of that page,
3 the first complete sentence reads, "It is
4 notable that this is not the first time this
5 criticism has been raised in a study conducted
6 for Weight Watchers." Did I read that
7 correctly?

8 A. Yes, you did. You did very well.

9 Q. The criticism you are referring to
10 there is your criticism that the universe in
11 Dr. Sabol's study was under inclusive, correct?

12 A. Yes.

13 Q. Dr. Kaplan, you understand that
14 Weight Watchers is a separate company from
15 Heinz, correct?

16 A. I somehow had the impression that
17 Heinz owned Weight Watchers, but I stand
18 corrected. Thank you.

19 Q. Weight Watchers is not a party to
20 this case, is it?

21 A. Not to my knowledge.

22 Q. And there is a footnote after that
23 sentence that I read that refers to citation to
24 a case involving Weight Watchers and Stouffer,
25 correct?

1 KAPLAN

2 A. Yes.

3 Q. Why did you include that citation in
4 your report?

5 A. I included that citation to make the
6 point and enable the reader to verify that what
7 I was saying was true.

8 Q. And what you are saying there was
9 that Weight Watchers has been criticized in the
10 past for conducting a survey in which the
11 universe was under inclusive?

12 A. When I said that, I know of at least
13 one time that criticism was made.

14 Q. What is your understanding of who
15 made that criticism in that case?

16 A. I think the judge in the matter
17 offered that as one of the criticisms that went
18 to the assured, the weight attached to the
19 Weight Watchers, the survey that was conducted,
20 the full Weight Watchers.

21 Q. Would it surprise you if I told you
22 that the criticism of the Weight Watchers'
23 study in that case was that the universe was
24 over inclusive?

25 A. It would, yeah. Is that really the

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case?

Q. That is really the case.

MS. GOTT: Can I have you mark this
as Opposers' Kaplan Exhibit 1.

(Whereupon Decision was marked
Opposers' Kaplan Exhibit 1 for
identification as of this date.)

Q. Dr. Kaplan, I am handing you what
has been marked as Opposers Kaplan Exhibit 1.
Can you identify this as the decision cited as
in footnote three of your report?

A. Yes, that's what it appears to be.

Q. If you'll turn to page 17 in the
upper right-hand corner -- I'm sorry, it's on
page 18. Page 272 of the opinion, which starts
on page 17, but continues to page 18, in the
full paragraph in the left-hand column there,
the last sentence, it states, "The universe of
the Weight Watchers' survey was designed at
women between the ages of 18 and 55 who have
purchased frozen food entrees in the past six
months and who had tried to lose weight through
diet and/or exercise in the past year." Did I
read that correctly?

1 KAPLAN

2 A. Yes.

3 Q. And the very next sentence reads,
4 "The Weilbacher studies did not limit the
5 universe to consumers who had purchased a
6 diet," and that word is in italics, "frozen
7 entree, or who had tried to lose weight through
8 diet as opposed to exercise; therefore, some of
9 the respondents may not have been in the market
10 for diet food of any kind, and the study
11 universe, therefore, was too broad." Did I
12 read that correctly?

13 A. Yes.

14 Q. In other words, the court found that
15 the universe for the Weight Watchers' study in
16 the Weight Watchers, Stouffer case was over
17 broad; isn't that correct?

18 A. In this case they did.

19 Q. Would you agree with me, Dr. Kaplan,
20 that a study conducted of purchasers of any and
21 all frozen meals would be an overbroad universe
22 to analyze the likelihood of confusion between
23 Smart Ones and Smart Balance frozen meals?

24 A. I'm sorry. I'm confused because you
25 see I was involved in this case. It was a

1 KAPLAN

2 study conducted not by Professor Weilbacher,
3 but by Professor Jacoby, which is mentioned on
4 page 21 and I thought that the criticism that I
5 discussed under representative was leveled at
6 the Jacoby study. So I'm confused.

7 MR. CROSS: It would have helped if
8 you had given him, I mean, you can do what
9 you want, but -- first of all, but it
10 would have helped if you had given him the
11 USPQ version for which it gives specific
12 pinpoint page citations.

13 Can you give us those particular
14 pinpoint page citations? What you've done
15 is handed this gentleman a decision that
16 goes on and on and on. It is well over 30
17 pages long. You have focused his
18 attention -- it's 33 pages long.

19 You have focused his attention on
20 one survey when it's clear there is more
21 than one and you're now trying to skip
22 over what appears to actually have been
23 the basis for the statement in this
24 report.

25 If you want to belabor this point,

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go ahead, but at least do it fairly with
this witness. Why don't you just withdraw
it or move on, one or the other?

Q. Dr. Kaplan, the pinpoint citations
in your report in footnote three, do you see
what those are?

A. Do you mean 291? I don't know what
you mean by the term pinpoint.

Q. In your citation here, are you
pointing out particular pages in the opinion
where you're citing to, is that what you are
doing in this citation?

A. I thought I was, but they don't
reflect numbers that I see on here.

MR. CROSS: That's because she gave
you a different form of the opinion than
the one you gave pinpoint citations to.
You gave pinpoint citations, specific page
reference to a USPQ report. She, however,
decided however to give you a West version
of this opinion. So those pages don't
match up conveniently.

MS. GOTT: Counsel, we can take a
break now for lunch and I'll print out the

1 KAPLAN

2 USPQ report.

3 MR. CROSS: Okay. How long would
4 you like to break?

5 MS. GOTT: Half an hour.

6 (Time noted: 12:34 p.m.)

7 (Luncheon recess taken.)

8 AFTERNOON SESSION

9 MS. GOTT: Actually, can you mark
10 this, please, as Opposers' Kaplan
11 Exhibit 2.

12 (Whereupon Decision was marked
13 Opposers' Kaplan Exhibit 2 for
14 identification as of this date.)

15 Q. Dr. Kaplan, I'm handing you what has
16 been marked Opposers' Kaplan Exhibit 2.

17 Before the break I was asking you a
18 few questions about Opposers' Kaplan Exhibit 1
19 and opposing counsel raised an objection to
20 this document because the page numbers didn't
21 reflect the USPQ citations.

22 Do you recognize that Kaplan
23 Exhibit 2 is the same document that I provided
24 you as Kaplan Exhibit 1?

25 A. I believe so, yes.

1 KAPLAN

2 Q. And I'll tell you that the
3 difference between the two, you'll see the page
4 numbers in bold, there is within the opinion an
5 asterisk and a page number and the page numbers
6 in Kaplan Exhibit 2 reflect the USPQ citation
7 whereas the page numbers in Kaplan Exhibit 1
8 reflect the Federal Supplement Reporter
9 citation.

10 So looking at your expert report on
11 page four, in footnote three, you have here
12 both citations, the federal supplement citation
13 and the USPQ citation; isn't that correct?

14 A. Yes.

15 Q. I'm not sure what the 291 signifies
16 in the 19 USPQ 2nd 291. Do you know what that
17 refers to?

18 A. I believe it signifies a typing
19 error on my part. Thank you.

20 Q. Thank you. So the USPQ citation of
21 this opinion is 19USPQ2D1321, correct?

22 A. Yes.

23 Q. And after that in your report
24 appears 1331, correct?

25 A. That's correct.

1 KAPLAN

2 Q. Does that indicate that the page
3 number that you are citing to in this opinion?

4 A. Actually, I'm uncertain at this
5 point and I apologize at this point. As I
6 said, I was involved in this on the Jacoby side
7 and my recollection was that we, Jacoby and I,
8 were criticized for a problem with the universe
9 and to my embarrassment, I somehow thought we
10 worked for Weight Watchers.

11 I see here that we clearly work for
12 Stouffers and we were criticized and that
13 Mr. Weilbacher conducted a study for Weight
14 Watchers. He also was criticized for problems
15 with his universe definition and that was the
16 point I inartfully tried to make here.

17 The truth is that both of us were
18 criticized for overly broad definitions of the
19 over inclusive definition of the universe, but
20 nonetheless, we both were criticized for --
21 both studies were criticized for a problem with
22 the definition of the universe and I apologize
23 for misremembering some of the particulars.

24 I knew there was a universe problem
25 and I have actually raised this before and

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2 cited that matter because of the erroneous
3 familiarity I had with it having taken some of
4 the heat, but -- so I apologize for
5 misremembering something and my statement here
6 talks about the universe definition. I can see
7 how it reads under inclusive, but the issue
8 really is they have overly broad definitions
9 with the universe. So I did not communicate
10 that as well as I should have.

11 Q. Objection to your response as a
12 narrative response and nonresponsive. I'll
13 move to strike it.

14 Dr. Kaplan, in this case, Weight
15 Watchers was the plaintiff; is that correct?

16 A. I believe so.

17 Q. And Stouffer was the defendant; is
18 that correct?

19 A. Yes.

20 Q. And you said that you were involved
21 in this study with Dr. Jacoby who was an expert
22 for the defendant Stouffer; is that correct?

23 A. That is correct.

24 Q. And both sides were criticized in
25 this survey for the scope of their universe,

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2 correct?

3 A. Yes, as I have read.

4 Q. And both sides were criticized for
5 the scope of their universe as being over
6 inclusive, correct?

7 A. Correct.

8 Q. The products at issue in this case
9 involved frozen meals, correct?

10 A. Yes.

11 Q. And the criticism of the court in
12 this case was that both parties as experts
13 defined the universe as people who had
14 purchased frozen food entrees generally,
15 correct?

16 MR. CROSS: Leon, you've shown that
17 you don't have perfect recall of something
18 that happened in 1990. I don't want you
19 to be guessing and if you need to read
20 this whole opinion before you start
21 answering questions about it again, do it.

22 If counsel is going to persist in
23 this absurd and wasteful line of
24 questioning. Are you withdrawing you're
25 last question.

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2 MS. GOTT: No.

3 Q. Certainly --

4 MR. CROSS: Then are you asking a
5 new question?

6 MS. GOTT: May I finish, please?

7 MR. CROSS: Yes.

8 Q. Certainly, Dr. Kaplan, if you would
9 like to read the opinion, I invite you to do
10 that. I direct your attention to page 12, the
11 heading on the left-hand column says "Actual
12 Confusion, Market Research Surveys." That is
13 the opinion where the likelihood of surveys are
14 discussed. That goes to page 15. If you would
15 like to read that section, I would invite you
16 to do so.

17 A. Thank you. That's what I was
18 looking for actually. Could you repeat
19 question for me, please?

20 (Whereupon the record was read back
21 by the reporter.)

22 A. That's correct.

23 Q. The court's criticism of both
24 surveys in this case was that it was not
25 limited to consumers who had purchased diet

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frozen entrees; isn't that correct?

A. That's what they said about Mr. Weilbacher's study. So I believe, yes, in both instances.

Q. I'll direct your attention to page 14.

A. That's what I'm looking at.

Q. And it says there that the universe here and there, I think we're at the same place in the opinion on the right-hand column about halfway through that first paragraph there, "As with the Weilbacher survey, the universe here does not focus upon people who ate diet or low-calorie frozen foods or even people who were trying to lose weight through dieting."

And the court concludes that the universe was flawed in that regard; is that correct?

A. That's correct.

Q. And they are discussing the defendant's survey in that case as well?

A. That's correct.

Q. And that is the Jacoby survey in which you were involved?

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2 A. That's correct.

3 Q. Would you agree with me, Dr. Kaplan,
4 that a study conducted of purchasers of any and
5 all frozen entrees or frozen meals would be an
6 over broad universe to analyze the likelihood
7 of confusion between Smart Ones and Smart
8 Balance frozen meals?

9 MR. CROSS: Objection. Incomplete
10 hypothetical. Are you talking about this
11 case, which is an intent to use
12 application, with a specific statement
13 about the goods involved or are you
14 talking about a different type of
15 hypothetical? It would be really nice if
16 you focused your question on this case.

17 Q. Dr. Kaplan, would you answer the
18 question, please?

19 MR. CROSS: Would you clarify it,
20 please?

21 A. Could you just repeat it? I'm
22 sorry.

23 (Whereupon the record was read back
24 by the reporter.)

25 MR. CROSS: Same objection. We seem

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2 to be trying two different cases.

3 A. The universe for this, the studies
4 that we are talking about here, again the
5 junior user's market and I don't remember
6 anything about the definition of the junior
7 user's market or what they were interested in
8 in any of the documents that talked about
9 restricting it to people who were dieting. So
10 that I don't think that is an appropriate
11 restriction. In fact -- and I don't believe
12 Dr. Sabol or Mr. Johnson used that to my
13 recollection.

14 Q. So it's your opinion that a study
15 conducted of purchasers of frozen meals
16 generally is not an over broad universe to
17 analyze the likelihood of confusion between
18 Smart Ones and Smart Balance frozen meals; is
19 that correct?

20 MR. CROSS: Objection. Same
21 objection to form. Incomplete
22 hypothetical.

23 Are you talking about this case or
24 some hypothetical case? Are you talking
25 about a notice of opposition, a trademark

1 KAPLAN

2 opposition proceeding or are you talking
3 about some other type of trademark
4 confusion case?

5 A. In this instance, I believe that the
6 universe composed of people who were likely to
7 purchase frozen meals from the frozen food
8 section of the supermarket is not overly broad.

9 Q. Dr. Kaplan, your work on this case
10 is being billed at \$400 an hour; is that
11 correct?

12 A. Actually since the start of the
13 year, my rate has gone up to 500.

14 Q. You spent 20 to 25 hours preparing
15 your report for this case; isn't that correct?

16 A. I forget. If that's what I said --
17 yes, it sounds about right, yes.

18 Q. So you billed GFA Brands
19 approximately eight to \$10,000 in connection
20 with your report; is that correct?

21 A. I don't remember, but that sounds
22 about right. I don't remember what I billed
23 it.

24 Q. You spent five to ten hours
25 preparing for your discovery deposition for

1 KAPLAN

2 this case; isn't that correct?

3 A. It sounds approximately right.

4 Q. How much time did you spend
5 preparing for your testimony deposition today?

6 A. Probably between ten and twenty.

7 Q. Hours?

8 A. Hours.

9 Q. All total, how much have you billed
10 GFA Brands for your work in connection with
11 this case?

12 A. I don't remember. I mean we can do
13 the arithmetic and probably get an idea. I
14 don't remember.

15 Q. Could you give me an estimate of
16 what you think you billed them in this case?

17 A. Fifteen to 20,000.

18 Q. Is that including for your time
19 today and your preparation for today's
20 deposition or no?

21 A. No, that hasn't been billed yet.

22 Q. And you said that today you spent
23 approximately 10 to 20 hours preparing for your
24 deposition today, correct?

25 A. Not today, but subsequent to the

1 KAPLAN

2 last --

3 Q. Invoice?

4 A. Yes.

5 Q. You've designed and conducted
6 numerous likelihood of confusion surveys over
7 the course of your career, correct?

8 A. I have designed and/or conducted
9 quite a few of them, yes.

10 Q. The costs for a likelihood of
11 confusion survey varied depending on the
12 methodology employed, the accessibility to the
13 relevant universe, the manner in which the
14 survey is carried out and the size of the
15 sample surveyed, correct?

16 A. Yes.

17 Q. As an expert, you had an opportunity
18 to review expert reports offered by your
19 client's adversaries, correct?

20 A. Usually.

21 Q. In reviewing those reports, you've
22 gained some knowledge about what others charged
23 for such work; isn't that correct?

24 A. I guess I have.

25 Q. In your experience, what is the

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general range of costs for a likelihood of
confusion survey?

MR. CROSS: Objection. Incomplete
hypothetical. Are we talking about a
properly done survey?

A. That goes -- as you so aptly noted,
that is a function of the accessibility of
respondents or the incidence of the people who
should be interviewed and the modality and
other considerations and they go -- can go all
over the place.

There is no -- an average would be a
meaningless statistic and also the size of the
sample and the range can be maybe from a little
below 20 to way up over \$100,000.

Q. In your experience, how much would
the cost be for a mall intercept survey
measuring likelihood of confusion if you
surveyed approximately 400 respondents?

A. I can't give you that answer. That
is an unknowable because I don't know who it is
I want to interview, what the incidence is and
you pretty much need to find out what the
market price is at any particular time in that

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2 there may be some variations based on -- that
3 agree to which a mall interviewing facility has
4 extra capacity and a desire to cover their
5 overhead. I never give off the cuff
6 estimations.

7 Q. Would the same be true then for the
8 cost of a telephone survey, that you wouldn't
9 be able to provide me with, in your experience,
10 what the cost would be for a telephone survey
11 measuring likelihood of confusion?

12 A. Yes.

13 Q. Because those costs can vary greatly
14 you said?

15 A. They can vary certainly by
16 incidence. You talked about the same sample
17 size, 400 and they also could be sensitive to
18 the degree to which the interviewing facility
19 anticipated a lot of idle phone lines and idle
20 interviewers.

21 Q. I believe you said that a range for
22 the likelihood of confusion survey could range
23 anywhere from did you say \$20,000 up to upwards
24 of \$100,000?

25 A. A little under 20 to over 100,000,

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sure.

Q. So a likelihood of confusion survey that costs under \$20,000 would not be unheard of; is that correct?

MR. CROSS: Objection to the form.

A. Very rare. Very rare. To me that would be very rare.

Q. Dr. Kaplan, what has been marked as Johnson Exhibit 4, that's your expert report in this case, correct?

A. Yes.

Q. And that's the only expert report that you prepared for this case, correct?

A. Yes.

Q. Nowhere in your report do you question Dr. Sabol's qualifications to serve as an expert; isn't that correct?

A. This was prepared before I received a copy of his testimony which brought to the floor issues about his qualifications. I did not address his qualifications or competency for a likelihood of confusion study, although I did point out a whole lot of shortcomings in his research.

1 KAPLAN

2 So I don't believe I addressed that
3 head on, but as I said, I have subsequent to
4 this seen a lot more and have a better
5 understanding of how he thought about things
6 and how he justified things he did and how he
7 evaluated another study which reflected, I
8 think, how to do things more consistent with
9 guidelines, more properly, better.

10 Q. Dr. Kaplan, so nowhere in your
11 report do you question Dr. Sabol's
12 qualifications to serve as an expert; isn't
13 that correct?

14 A. I think so.

15 Q. You have not prepared a supplemental
16 report to disclose any opinions not contained
17 in Johnson Exhibit 4; isn't that correct?

18 A. That's correct.

19 Q. I have no further questions.

20 MR. CROSS: I have just a couple of
21 clarifying questions concerning the
22 questions counsel asked you about the
23 Cristal case in which you were involved.

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2 CONTINUED EXAMINATION

3 BY MR. CROSS:

4 Q. I believe you had testified that in
5 the Cristal case you did ask respondents if
6 they were aware of the senior user's mark as
7 part of your survey; is that correct?

8 A. Yes, I did.

9 Q. Why? What is different about the
10 Cristal case and this Trademark Trial and
11 Appeal Board opposition receipt that led you to
12 ask respondents about awareness of the senior
13 user's mark in the Cristal case?

14 A. Several things. We had real
15 products in the Cristal case. We had a bottle
16 of Cristal and a bottle of the alleged
17 infringer, Cristalino and a bottle of a control
18 that I made up or had made called Cristalino.
19 So I had real products for one thing.

20 The other thing is that Cristal is a
21 unique product, has unique marketing
22 characteristics. I never encountered something
23 like Cristal before. It is what they call a
24 niche product. It means it appeals to a small
25 segment of the market. It is, I believe, the

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2 most expensive champagne. So again, it appeals
3 to a small segment who either wanted to be
4 known that they are drinking Cristal or they
5 really like the taste.

6 Beyond that, it's what I would call
7 capacity constrained, which means that they
8 can't make any more of it. As I learned as we
9 were, as I was going over how to design it,
10 thinking about it, the champagne that they sell
11 comes from grapes that are produced in their
12 vineyards, no place else. And their vineyards
13 are totally maxed out.

14 It's not like a consumer product
15 where one could erect another plant and
16 increase your capacity. They are stuck with
17 what they can produce. No way to make any
18 more. So from my perspective, that was
19 different from something like this where we
20 have products, brands, makers who are committed
21 to growth, who are trying to grow their
22 markets, their profitability, everything else.

23 In the Cristal case, because all
24 they really cared about is current customers,
25 they sell out every year, totally sell out and

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2 there is a big waiting list for cases of the
3 stuff, I felt it was appropriate to limit the
4 study to people who were aware of Cristal.

5 The first time I ever came to that
6 opinion in a likelihood of confusion matter
7 because they were -- there was no way they
8 could grow the market. There was no way they
9 could make the customer base bigger. The aware
10 people is what counted. It is analogous to if
11 I had a product that was available every place
12 but in the Northwestern part of the United
13 States, I wouldn't do the likelihood of
14 confusion interviewing in the western part of
15 the United States.

16 It's not part of their market and
17 that was why I did that and that was the way I
18 explained it in my report. Unfortunately, the
19 judge didn't completely see it that way. So I
20 have learned that you -- even if you're really
21 sure that you are right, you have to be very
22 careful in deviating from the generally
23 accepted guidelines. That was the difference.

24 Sorry for that. That was the
25 subject of a very long, a lot of thinking on my

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part. I wish it was for naught.

MR. CROSS: Thank you. No more
questions.

MS. GOTT: I think we are done.

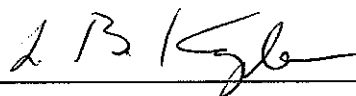
THE WITNESS: Thank you.

(Time noted: 1:56 p.m.)

A C K N O W L E D G M E N T

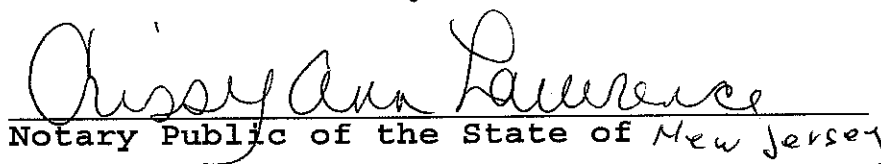
STATE OF)
) ss.:
COUNTY OF)

I, LEON KAPLAN, hereby certify that I have
read the transcript of my testimony taken under oath
in my deposition on the 23rd day of April, 2013; that
the transcript is a true, complete record of my
testimony and that the answers on the record as
given by me are true and correct.



LEON KAPLAN

Signed and subscribed to before
me this 13th day of
May, 2013.


Notary Public of the State of New Jersey

CRISSY ANN LAWRENCE
Notary Public
State of New Jersey
My Commission Expires June 27, 2013

C E R T I F I C A T E

I, FRAN INSLEY, hereby certify that the Deposition of LEON KAPLAN was held before me on the 23rd day of April, 2013; that said witness was duly sworn before the commencement of testimony; that the testimony was taken stenographically by myself and then transcribed by myself; that the party was represented by counsel as appears herein;

That the within transcript is a true record of the Deposition of said witness;

That I am not connected by blood or marriage with any of the parties; that I am not interested directly or indirectly in the outcome of this matter; that I am not in the employ of any of the counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 29th day of April, 2013.



FRAN INSLEY

ERRATA

ELLEN GRAUER COURT REPORTING CO. LLC
126 East 56th Street, Fifth Floor
New York, New York 10022
212-750-6434

NAME OF CASE: PROMARK vs. GFA
DATE OF DEPOSITION: April 23, 2013
NAME OF WITNESS: LEON KAPLAN

PAGE	LINE	FROM	TO	REASON
4	9	Bert	Burt	
10	20	Pardue	Pardue	
26	8	replicating	replication	wrong word
27	14	the 30	the next 30	missing "next"
28	8	Criteria	criterion	
28	18	person was	person's was	missing "I"
32	11	people for position	people into positions	
32	12/13	Delete "likely to confusion"		
33	13	likely to confusion	litigation	
34	5	Different	Differ	
34	11	likelihood of confusion	likelihood of confusion	insert of
34	16	about relationship	about the relationship	insert "the"
36	8	nonexistent		Delete "non-existent"

L.B.K.

Subscribed and sworn before me

this 13th day of May, 2013.

Crissy Ann Lawrence

(Notary Public)

My Commission Expires:

CRISSY ANN LAWRENCE

Notary Public

State of New Jersey

My Commission Expires June 27, 2013

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PAGE LINE FROM TO REASON

36	15	constraint	consistent	
36	19	offer		Delete "offer"
39	20	the		Delete "the"
39	10	any way	any other way	insert "other" LK
40	16	any way	any other way	insert "other" dk
40	18			Something is missing!
41	20	some	the same	
41	25	Ones	in their names.	Delete & replace
42	12	not, whatever	not. Whatever	replace & w/ " & capitalize
43	6	take account	account	Delete take make word account
43	25	-- another	-- in another	Insert "in" before -- & another
44	3	usually get	he usually gets	insert "he" before usually & gets
44	16/17	Delete "from and on line 16 thru the 2 on line 17." LBI		

Subscribed and sworn before me

this 13th day of May, 2013.

Crissy Ann Lawrence

(Notary Public)

My Commission Expires:

CRISSY ANN LAWRENCE

Notary Public

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PAGE	LINE	FROM	TO	REASON
47	19	in	at	
52	7	recall	call	
58	22		Delete	second "of"
58	21		Delete	"the"
64	20	or	at	
86	21	in	at	
93	24	heard it	heard of it	
96	13	chain	train	
96	22	are	here	
102	10	between string	between what a string	
115	17	unaffably	inartfully	
116	9	have definition	have overly broad definition	
129	18	Quentin	Cristalino	
130	25	concurring	current	L.B. / Sayl

Subscribed and sworn before me

this 13th day of May, 2013.

Crissy Ann Lawrence

(Notary Public)

My Commission Expires:

CRISSY ANN LAWRENCE

Notary Public

State of New Jersey

My Commission Expires June 27, 2013

	8:2		41:16	affiliated (1)
\$	1982 (2) 13:17;15:16	5	account (2) 43:5;57:16	48:19
\$10,000 (1) 122:19	1988 (1) 13:18	500 (1) 122:13	accounted (1) 63:8	aftermentioned (1) 42:12
\$100,000 (2) 125:16;126:24	1990 (1) 117:18	54 (2) 62:25;63:20	achieve (2) 7:12;47:15	AFTERNOON (1) 113:8
\$15,000 (1) 43:20	19USPQ2D1321 (1) 114:21	55 (1) 109:21	acknowledgement (1) 56:8	again (10) 27:24;46:3;48:6; 68:21;70:10;95:22; 100:2;117:21;121:4; 130:2
\$20,000 (2) 126:23;127:4	2	7	acquaint (1) 56:10	ages (1) 109:21
\$400 (1) 122:10	2 (5) 113:11,13,16,23;114:6	75 (3) 102:16;103:2,9	Act (6) 19:17;20:10;45:19,24; 57:14;97:23	ago (4) 18:9;54:3,3;98:17
0	20 (4) 122:14;123:23; 125:16;126:25	79 (2) 9:7,9	actual (4) 27:8;88:12,19;118:11	agree (11) 86:13;89:21;90:5; 98:23;101:15,16; 102:18;103:12;110:19; 120:3;126:3
0 (2) 81:18;82:11	20,000 (1) 123:17	8	actually (15) 17:7;55:23;64:20; 83:12,14;89:17;90:17; 91:13;98:10;111:22; 113:9;115:4,25;118:18; 122:12	ahead (8) 5:22;37:11;46:10; 52:12;56:5;57:24;97:19; 112:2
1	2011 (1) 4:22	80s (1) 16:12	add (1) 11:3	Aided (5) 63:17;99:7,11,23; 100:7
1 (8) 4:25;62:21;109:5,7, 10;113:18,24;114:7	21 (1) 111:4	82 (1) 63:13	added (2) 10:21;81:25	aisle (1) 85:21
1:56 (1) 132:7	25 (1) 122:14	88 (1) 13:19	Adding (1) 63:22	aisles (1) 86:25
10 (1) 123:23	250 (4) 31:3,12;63:20,20	A	addition (2) 40:17,19	alleged (11) 20:20;21:6,10;22:20; 34:12,13,14,17,25; 42:21;129:16
10:46 (1) 54:19	26 (1) 63:24	aback (1) 56:15	additional (2) 43:16;49:19	allows (1) 70:12
10:53 (1) 54:21	272 (1) 109:16	Abbey (2) 60:6,8	additions (2) 10:24;11:5	alone (1) 31:3
100,000 (1) 126:25	29 (1) 47:24	A-B-B-E-Y (1) 60:9	address (7) 18:23;26:20;30:4; 31:19;47:25;52:20; 127:22	alternatives (2) 50:14;71:8
101 (1) 43:2	291 (3) 112:8;114:15,16	able (5) 35:9;67:16;71:14; 92:7;126:9	addressed (5) 35:5,7;55:10;67:21; 128:2	although (1) 127:23
11:01 (1) 58:24	2nd (1) 114:16	above (1) 102:11	adequately (1) 35:4	always (10) 21:22,22;23:11;47:7; 48:10,11,17;49:2,4;95:4
11:02 (1) 59:3	3	absence (1) 32:6	adjunct (1) 10:5	ambiguous (1) 42:8
12 (1) 118:10	30 (13) 6:12;27:2,14;28:6; 53:13;54:5,15;63:10,14; 74:18,20;75:19;111:16	Absolutely (4) 7:4;42:16;51:24;56:18	adjustment (1) 26:14	amend (1) 68:17
12:02 (1) 97:8	304 (1) 63:20	abstract (1) 72:20	administrative (1) 60:15	American (3) 9:15,20;16:16
12:10 (1) 97:10	32 (1) 63:24	absurd (1) 117:23	admissibility (2) 57:20;58:4	among (5) 20:22;21:4;100:25; 101:7;105:11
12:34 (1) 113:6	33 (1) 111:18	academicians (1) 13:21	advanced (1) 10:12	amount (5) 52:14,15;74:5;96:21, 22
1331 (1) 114:24	4	acceptable (6) 6:15;15:14;33:19; 71:18,23;72:10	advantage (1) 92:6	analogous (1) 131:10
14 (1) 119:7	4 (8) 5:13,18;6:3;10:15; 11:8;54:24;127:10; 128:17	accepted (12) 5:19;16:5;49:12,25; 50:3;87:22;89:24;90:8; 91:2,3,7;131:23	adversaries (1) 124:19	analyses (2) 11:16;12:16
15 (1) 118:14	400 (2) 125:20;126:17	accessibility (2) 124:12;125:8	advertising (4) 4:19;8:20;11:22;15:25	analyze (3)
17 (2) 109:14,17	4A (1) 45:8	accordance (2) 5:19;49:11	affect (2) 31:16,17	
18 (4) 63:8;109:16,17,21		according (1) 63:12		
19 (2) 52:23;114:16		accordingly (1)		
1975 (1) 9:7				
1979 (1)				

110:22;120:6;121:17 and/or (3) 44:23;109:24;124:8 answered (2) 68:20;72:12 anticipate (1) 96:15 anticipated (1) 126:19 APA (1) 9:17 apologies (1) 20:7 apologize (4) 40:13;115:5,22;116:4 apparent (1) 48:13 apparently (1) 49:6 Appeal (6) 14:5;17:8,21,21; 59:18;129:11 appeals (2) 129:24;130:2 appear (4) 29:16;33:2;41:6;59:23 appears (5) 24:5;101:8;109:13; 111:22;114:24 application (2) 16:18;120:12 applications (1) 10:10 applied (1) 18:23 approach (2) 45:22,24 appropriate (28) 14:18;24:4;26:6; 27:11;28:8,14;33:21; 37:17,20;38:18;48:5; 49:21;52:24;65:10;66:6, 24;67:7,23;74:8,11,12; 76:3;79:23;100:19,22; 101:10;121:10;131:3 appropriately (1) 45:13 appropriateness (2) 27:7;38:4 approximately (5) 64:9;122:19;123:3,23; 125:20 approximation (1) 42:5 apt (1) 23:3 aptly (1) 125:7 area (9) 14:17,22;18:15;36:8; 41:21;56:14,20;85:6; 101:5 arguments (1)	44:22 arithmetic (1) 123:13 around (2) 13:10;52:16 array (4) 94:6,11,12;95:17 article (3) 14:23;15:2;16:9 articles (1) 14:16 artifact (1) 41:11 aspect (7) 23:3;34:2,13,13;35:2; 49:19;55:21 aspects (1) 87:15 assess (7) 20:12;69:24;87:20; 88:4;97:16;98:8,19 assessed (1) 57:20 assessing (6) 58:4,7;88:10,21; 89:22;90:6 assisted (1) 13:25 associate (1) 103:21 associated (3) 39:3;40:3,25 Association (3) 9:16,22;16:17 associations (1) 9:13 assume (2) 44:13;73:19 assuming (6) 45:2;50:12;82:8; 86:19;87:9;92:13 assumptions (1) 44:23 assured (1) 108:18 asterisk (1) 114:5 ate (1) 119:14 attached (3) 10:15;11:6;108:18 attempt (2) 48:24,25 attempting (1) 42:20 attempts (1) 20:12 attention (6) 52:20;106:25;111:18, 19;118:10;119:6 attorney (1) 15:5 attorneys (1)	20:11 attractive (1) 28:3 atypical (2) 30:14;31:5 author (1) 15:3 authored (1) 15:2 authoritative (2) 14:17;101:4 authorized (1) 62:16 available (1) 131:11 average (1) 125:13 avoid (4) 71:18,23;72:10;96:14 aware (34) 27:3;28:12;29:6,17, 19;61:18;62:7;71:10; 72:7,15,24;78:16;81:13, 17,20,24;83:9,13,16,18; 84:2,5,8;89:25;90:10,14; 91:4;94:15,21;99:22; 103:20;129:6;131:4,9 awareness (17) 39:7;63:23;91:11; 98:20;99:7,23;102:5,17, 19,21,25;103:3,5,9,10; 129:12 away (6) 19:14;50:16,16,21; 56:24;92:16 awesome (1) 52:15	12:19;13:8,9 Banquet (10) 77:2,5,9,13,17,21,25; 78:11;79:12,17 base (2) 63:19;131:9 based (16) 6:7;15:14;17:6;18:18; 25:9;26:2;27:3;29:15; 45:17;46:21;50:2;63:23; 66:10;78:23;99:23; 126:2 basic (1) 23:8 basis (3) 33:18;40:18;111:23 batteries (1) 18:24 battery (1) 18:21 become (2) 13:22;87:21 becomes (1) 31:14 becoming (2) 8:25;9:4 began (2) 13:18,19 begin (1) 26:17 beginning (3) 13:13;26:20;52:3 behalf (3) 61:14,14;73:8 behavior (1) 75:4 behind (1) 36:4 belabor (1) 111:25 belief (3) 28:16,18;34:16 beliefs (1) 67:12 belong (7) 9:12,15,18,19,20; 38:19;66:21 below (1) 125:16 best (3) 14:3;49:10;95:12 better (4) 27:18;47:13;128:4,9 Beyond (3) 43:24;46:8;130:6 bias (2) 24:2;90:18 big (5) 41:14;44:7,7;75:25; 131:2 bigger (1) 131:9 billed (6)	122:10,18,22;123:9, 16,21 bit (7) 4:21;5:25;11:12; 36:10,11;37:17;45:16 blah (3) 69:14,14,14 Board (3) 14:5;59:18;129:11 body (1) 60:15 bogus (1) 47:19 bold (1) 114:4 boom (1) 96:6 both (24) 15:4;32:7;40:23; 41:18,24;46:2;51:16; 52:13;54:24;70:22; 75:11;84:16,20,24; 100:14;114:12;115:17, 20,21;116:24;117:4,12; 118:23;119:5 bottle (4) 93:16;129:15,16,17 bottom (1) 63:6 bought (2) 27:20;28:2 brand (19) 20:2;34:4,4;38:24; 39:19,19;41:15;63:15; 82:6,25;99:19;102:6,12, 18;103:3,4,11,13,20 brands (8) 19:25;38:8;60:2;82:4, 23;122:18;123:10; 130:20 break (7) 54:17;96:11,19;97:7; 112:25;113:4,17 Brief (2) 54:20;97:9 briefly (2) 18:10;35:3 broad (7) 110:11,17;115:18; 116:8;120:6;121:16; 122:8 Brooklyn (1) 7:13 brought (1) 127:20 Burt (1) 4:9 business (9) 4:15;10:10;13:14,22; 19:22;20:2;30:16;31:6,7 buy (4) 27:24;28:22;47:13; 79:7
B				
Bachelor's (1) 7:14 back (12) 15:16;28:18;32:22; 45:3;48:23;49:7;54:22; 66:5;80:8,10;118:20; 120:23 backed (1) 66:12 background (3) 7:8;32:3,5 bad (3) 24:14;26:15;29:8 Balance (36) 29:13,16;39:2;46:7; 50:20,20;51:16;61:24; 62:5,11,16;80:14,19; 81:9,10,13,17,21,25; 82:6,8,24;84:12,16,20, 24;85:5,9,20,24;86:4,9; 104:22;110:23;120:8; 121:18 ballpark (3)				

buying (2) 47:17;87:9	79:24;80:6,15;85:8,15, 25;86:25;89:7,9,11,14; 91:24;93:9,12,24; 104:18;106:19;107:20, 24;108:15,23;109:2,3; 110:16,18,25;116:14; 117:8,12;118:24; 119:22;120:11,16; 121:23,24;122:4,9,15; 123:2,11,16;127:11,14; 128:23;129:5,10,13,15; 130:23	43:22 cholesterol (4) 79:14;81:22;82:12,18 circumstances (2) 16:15;75:12 citation (10) 107:23;108:3,5; 112:10,13;114:6,9,12, 13,20 citations (8) 106:12;111:12,14; 112:5,18,19;113:21; 114:12 cited (7) 16:24;75:2,7;106:19, 23;109:11;116:2 citing (3) 19:3;112:12;115:3 claim (3) 99:8,12,22 claimed (1) 19:13 clarify (3) 42:9;88:20;120:19 clarifying (1) 128:21 classifies (1) 50:15 clean (1) 26:8 clear (8) 33:12;34:7;36:25; 53:9;58:14,20;72:3; 111:20 clearer (1) 8:24 clearly (1) 115:11 client (3) 11:15;24:4;73:8 clients (1) 106:2 client's (2) 61:12;124:19 close (3) 13:3;22:19;85:10 closed (3) 39:21;40:7;72:18 closed-ended (2) 40:14,15 closer (1) 86:15 colleagues (3) 14:21;18:19;28:16 collect (1) 87:4 college (3) 7:9,13,15 color (1) 23:2 column (3) 109:18;118:11;119:11 coming (4)	20:25;28:16;47:12; 96:18 Comment (1) 35:24 comments (3) 12:11;17:7;56:21 committed (1) 130:20 communicate (1) 116:9 company (15) 8:15,21,25;19:23; 20:3;40:2;41:14,19; 48:18;102:23;104:4; 105:5,8,20;107:14 company's (1) 13:14 comparison (2) 67:6;96:25 compensate (1) 25:18 compete (1) 86:5 competency (1) 127:22 competition (1) 15:6 competitor (1) 105:24 complete (2) 87:11;107:3 completely (3) 27:9;45:23;131:19 Complex (3) 14:23;15:8;58:3 compliance (2) 24:6;25:24 composed (1) 122:6 comprehension (1) 11:24 compromise (1) 67:14 concept (2) 38:18;39:9 concerned (3) 34:12;48:2,4 concerning (6) 31:22;45:4;52:24; 57:21;99:18;128:21 concluded (1) 26:9 concludes (1) 119:17 conclusion (2) 6:10,11 conclusions (2) 6:6;7:9 conditions (2) 47:3;87:15 conduct (7) 57:22;58:19,20;73:3, 11,20;103:24	conducted (36) 5:2;16:3,3;17:6;20:14; 23:14,17;51:5;52:6; 58:8;59:10,14;73:7; 88:3;92:25;93:12;95:8; 97:12,15;98:8,11;104:4, 8,12,20,24;105:15; 107:5;108:19;110:20; 111:2;115:13;120:4; 121:15;124:5,8 conducting (7) 33:9;73:21;87:19,23; 91:20;94:24;108:10 confidentiality (1) 61:4 confirm (2) 48:24,25 confused (9) 21:9;61:23;62:4,8,10, 15;70:9;110:24;111:6 confusing (2) 45:5;64:19 confusion (68) 18:4,16;19:14,18,18, 20,21;20:21,23;23:4; 26:14;29:10,11;33:13; 34:11;36:9;42:19,22; 44:3,5,15,17,21;49:24; 57:5,16,17;58:21;60:21; 61:20;63:24;64:18; 65:20;68:4,10;87:21,24; 88:4,8,11,22;89:7,9,11, 14,23;90:7,25;91:21; 94:24;100:14,24;101:5; 110:22;118:12;120:7; 121:17;122:4;124:6,11; 125:3,19;126:11,22; 127:3,23;131:6,14 conjure (1) 87:6 connected (8) 39:4,10,16,19;40:4,16; 41:2;46:19 connection (11) 5:9;31:20;41:17,23; 46:6;97:22;103:25; 104:5,13;122:19;123:10 consider (12) 14:17;37:18,21;82:13, 14;88:11,18;89:24;90:9, 12;91:3;105:23 consideration (1) 91:11 considerations (3) 20:17;81:11;125:11 considered (1) 65:12 considering (1) 79:23 consistent (8) 24:11;36:13,15;45:23; 57:2,11,14;128:8 constrained (1)
C	cases (9) 15:12;16:23;25:25; 56:12;99:3,15;106:22; 121:2;131:2 category (2) 30:2;75:24 causal (2) 34:19;42:24 causality (2) 34:12,21 cause (4) 19:13;23:4;89:23;90:7 causing (4) 21:6;34:15;36:7;42:22 caution (1) 54:9 cell (10) 21:2,4;25:15;43:16; 44:8,9,16,18,22;94:7 Center (3) 4:12;9:9;15:10 CEO (1) 4:14 certain (6) 17:15;30:11;40:6; 44:23;52:14;96:21 certainly (9) 33:2;36:14;54:18; 56:19;85:23;102:15; 118:3,8;126:15 certainty (2) 6:3;7:3 cetera (2) 31:7;87:10 Champagne (10) 93:9,16,21;94:4,10,16, 17,19;130:2,10 chance (1) 31:3 change (2) 24:5;96:2 changed (4) 23:9;55:16,20,22 channels (1) 84:14 characteristics (5) 18:12;19:4,5;97:3; 129:22 charged (1) 124:22 charity (1)			

130:7 Consulting (2) 4:11;9:9 consumed (1) 103:22 consumer (10) 7:16,19,20;9:18;10:3, 7,8;104:20,24;130:14 consumers (9) 63:9,13;86:8;88:12, 13,15,17;110:5;118:25 consumers' (1) 82:12 consumer's (1) 81:22 contact (1) 11:15 contain (4) 66:23;81:14;82:9;84:9 contained (3) 35:22;37:9;128:16 contains (1) 65:9 contaminate (1) 38:23 context (3) 36:16;47:7;89:19 CONTINUED (1) 129:2 continues (1) 109:17 contribute (1) 13:2 contributed (1) 64:8 contribution (1) 43:21 control (30) 20:15;21:2;22:10,11, 12,13,19;23:9;25:13,15; 26:13,13;31:17;34:22, 24;42:4,14,15,18,22,25; 43:9,12;44:3,9,18,22; 52:19;95:19;129:17 controls (1) 43:3 conveniently (1) 112:23 Convention (1) 16:17 converts (1) 31:14 copy (1) 127:20 core (1) 57:15 corner (1) 109:15 Corporation (1) 9:4 corrected (1) 107:18 correctly (3)	107:7;109:25;110:12 cost (4) 43:16;125:18;126:8, 10 costs (4) 124:10;125:2;126:13; 127:4 Counsel (4) 112:24;113:19; 117:22;128:22 count (1) 68:5 counted (1) 131:10 couple (9) 12:23,24;14:8;47:10; 51:3;56:6;64:5;67:8; 128:20 course (1) 124:7 courses (1) 9:23 court (11) 14:2,9,14;16:6;25:7; 59:17;60:15,17;110:14; 117:11;119:17 court's (1) 118:23 cover (1) 126:4 covered (1) 39:15 creation (1) 12:13 credentials (1) 5:24 Cristal (20) 93:9,16,21,24;94:3,10, 15,17,19;128:23;129:5, 10,13,15,16,20,23;130:4, 23;131:4 Cristalino (2) 129:17,18 criteria (4) 29:15,22;49:4;65:11 criterion (1) 28:9 critical (3) 38:21,23;40:19 criticism (18) 45:7,9;47:19;52:22; 53:4,5,7;72:22,24;107:5, 9,10;108:13,15,22; 111:4;117:11;118:23 criticisms (7) 36:2,6;45:4;57:7,10; 74:6;108:17 criticized (14) 36:22;50:10;59:14,15, 16;108:9;115:8,12,14, 18,20,21;116:24;117:4 criticizes (1) 57:13	criticizing (2) 36:12,17 critique (12) 6:7;21:16,20;25:10, 16;26:3,17,21;43:18; 48:8;106:15,17 critiquing (1) 73:25 CROSS (31) 4:7;61:2,8;62:6;63:4; 65:25;72:12;73:13,16; 78:7;85:13;88:6;95:2; 97:6,17;103:6;111:7; 112:16;113:3;117:16; 118:4,7;120:9,19,25; 121:20;125:4;127:6; 128:20;129:3;132:3 cue (3) 71:17,22;72:8 cuff (1) 126:5 Cuisine (5) 77:2;78:17,20;80:24; 81:6 current (1) 130:24 currently (1) 80:18 custom (2) 9:5,6 customer (1) 131:9 customers (3) 19:8;88:19;130:24 cut (1) 34:8 CV (4) 10:14;11:5;14:10; 59:23	4:22 decided (2) 9:8;112:21 decision (7) 17:5,20;34:8;109:6, 11;111:15;113:12 decisions (4) 15:12,15;24:9;28:18 declined (1) 56:2 decrease (1) 65:18 defendant (4) 16:2;61:15;116:17,22 defendant's (2) 19:8;119:22 define (5) 15:13;76:2;101:23; 102:12;103:8 defined (8) 20:9;26:23;29:12; 64:24;74:10,12,15; 117:13 defining (3) 18:11;19:4,5 definitely (1) 16:7 definition (11) 23:25;26:18,22;28:13; 38:11;97:19;115:15,19, 22;116:6;121:6 definitions (2) 115:18;116:8 degree (9) 6:3;7:2,11,16,25;41:4; 96:2;98:19;126:18 degrees (1) 7:24 Delaware (1) 10:6 department (1) 8:21 depend (1) 66:14 depending (2) 102:24;124:11 depends (7) 66:13;67:4,19;92:5; 95:4,7;102:21 deposed (1) 60:12 deposition (8) 10:19,25;56:23;59:22; 122:25;123:5,20,24 depositions (1) 10:21 describe (1) 33:25 described (1) 23:6 descriptive (2) 34:6,19 design (19)	9:6;11:15;12:5,9,12, 21;13:2;14:18;19:11; 20:6,13;23:8;64:8;74:4; 90:21;98:12;100:22,23; 130:9 designed (8) 26:6;64:14,17;81:21; 82:11;109:20;124:5,8 designing (4) 12:4;13:25;64:12; 104:16 desirable (1) 47:6 desire (1) 126:4 desired (1) 50:8 detail (1) 36:11 details (1) 7:5 determine (3) 67:16,24;101:21 determining (1) 57:20 detrimental (3) 75:13,21,24 deviating (1) 131:22 dial (1) 49:7 Diamond (5) 15:3,4;16:8,11;69:9 diet (7) 54:6;109:24;110:6,8, 10;118:25;119:14 dieting (2) 119:16;121:9 differ (2) 34:5,25 difference (4) 33:15,23;114:3; 131:23 different (16) 9:17;11:21;20:17,19; 31:10;34:2,3,20;42:6; 51:18;57:15;112:17; 120:14;121:2;129:9; 130:19 difficult (1) 50:23 dinner (1) 54:2 direct (4) 16:10;106:25;118:10; 119:6 directed (3) 53:7;55:3;106:22 direction (1) 104:10 discern (1) 49:11 disclose (1)
		D		
		data (5) 87:4;88:11,14,16; 98:16 date (6) 10:16,18;11:3,6; 109:8;113:14 days (13) 27:3,15;28:6;51:3; 53:13,21;54:3,5,15; 63:10,15;74:18;75:19 DC (1) 7:21 deal (3) 8:9;29:11;52:18 dealing (2) 31:11;47:8 deals (1) 27:19 dealt (2) 8:9;74:3 December (1)		

128:16 discourage (2) 32:11;71:13 discovery (1) 122:25 discussed (5) 16:18;82:15;90:23; 111:5;118:14 discussing (1) 119:21 discussion (2) 24:3;58:25 displayed (3) 85:10,21,25 displays (1) 87:2 dispute (1) 101:12 disqualified (1) 63:2 disqualify (1) 87:3 dissimilar (1) 66:20 distinction (1) 67:21 distorted (1) 38:17 distract (2) 96:4,11 distracter (2) 95:15,20 distributes (1) 41:20 District (1) 15:23 DNA (1) 25:23 Doctor (1) 43:24 document (2) 113:20,23 documents (1) 121:8 done (30) 12:2;13:10;21:17,22, 23;22:3;25:3;30:6;44:5; 46:11;47:13;48:5,12; 49:15;50:5;51:7,9;56:9, 12;57:2,2;88:8;95:12; 98:13;101:20;105:18; 106:17;111:14;125:6; 132:5 doubt (2) 58:19;61:4 Dr (76) 4:23;5:2,15;17:23; 28:10;29:15;30:20; 31:25;32:2;35:9,24; 36:2,7,17;37:4,8,18; 40:5;42:14;43:8,25; 45:4;46:9,25;47:25; 50:15;52:7;55:25;57:6;	58:12;59:6;61:17,19; 62:19,19,25;63:7,12; 68:16;69:3,11;73:3,25; 74:7;76:8;79:6;86:13; 91:25;97:11,21;99:17; 100:4;103:24;105:4,16; 106:11,15,16;107:11,13; 109:9;110:19;112:5; 113:15;116:14,21; 118:8;120:3,17;121:12; 122:9;127:9,17;128:10, 11 dress (1) 20:24 drink (1) 34:3 drinking (1) 130:4 drive (1) 75:4 duly (1) 4:2 Dupont (3) 8:14,21,25 dynamic (1) 32:20	emulated (2) 47:2;87:18 emulating (2) 47:5,12 enable (2) 22:22;108:6 enabled (1) 7:8 encounter (3) 57:16;86:8,17 encountered (2) 25:13;129:22 end (2) 21:7;31:3 ended (4) 16:21;39:21;40:7;75:8 engage (1) 48:16 engaged (1) 5:6 enough (1) 23:21 entered (1) 16:10 entitled (1) 14:23 entity (1) 75:22 entree (2) 26:25;110:7 entrees (13) 82:5,23;83:2,5,10,19; 84:3,6,9;109:22;117:14; 119:2;120:5 equals (1) 63:20 erect (1) 130:15 erroneous (3) 34:16,16;116:2 error (1) 114:19 especially (4) 31:16;100:19,21; 101:9 essentially (1) 23:7 establish (3) 34:22;42:23;86:21 establishing (1) 45:14 estimate (3) 12:20;61:20;123:15 estimating (1) 22:14 estimations (1) 126:6 et (2) 31:7;87:10 evaluate (5) 5:11;16:2,3;24:7,8 evaluated (2) 13:16;128:7	evaluating (3) 5:15;23:21;68:3 evaluation (1) 37:21 even (15) 17:15;18:3;24:20; 26:12,20;28:17;38:17; 42:4;53:23,25;54:3,10; 85:25;119:15;131:20 event (1) 10:24 eventually (1) 8:25 Eveready (13) 18:3,7,12,20,21,24; 20:13;21:11;90:21; 100:15,18,22;101:9 everywhere (1) 54:9 evidence (4) 14:25;17:11;20:23; 25:7 exact (1) 20:21 exactly (3) 37:17;70:16;91:19 EXAMINATION (3) 4:6;59:4;129:2 examined (1) 4:3 example (1) 69:11 examples (2) 75:2,7 exchange (1) 16:22 exclude (3) 30:11,15,17 excluded (2) 29:25;63:23 exclusion (1) 61:18 excuse (2) 58:6;106:16 execute (1) 13:20 execution (4) 11:16;12:15,22;14:19 exemplar (1) 19:11 exercise (2) 109:24;110:8 exert (1) 30:25 Exhibit (22) 4:25;5:13,18;6:3; 10:15;11:8;54:24;55:11; 62:21;109:5,7,10; 113:11,13,16,18,23,24; 114:6,7;127:10;128:17 exist (1) 30:19 expect (3)	65:17;85:8,14 expensive (1) 130:2 experience (28) 18:15,18;22:7,8; 23:17,19;27:22;28:5; 30:8,10,13,31:6,8;32:6; 36:8;44:2,4;46:3;50:2; 56:9;74:22;75:3,12,20; 87:19;124:25;125:17; 126:9 experience- (1) 23:12 expert (21) 12:18;35:22;37:9; 46:9;56:2,14;60:10,20; 61:14;93:8;99:25; 100:13;103:18;114:10; 116:21;124:17,18; 127:10,13,18;128:12 experts (3) 12:7;13:21;117:12 explain (1) 56:16 explained (3) 20:10;56:16;131:18 explanation (2) 43:12;87:11 explanations (1) 43:14 explanatory (1) 34:19 expose (1) 94:22 exposed (1) 92:2 exposure (2) 95:16,18 expressed (1) 6:2 expressing (1) 71:15 extent (4) 35:21;37:7;97:17; 100:6 extra (2) 72:18;126:4 extraneous (3) 20:17;22:23;43:6
E				
earlier (7) 59:9;75:2;80:21,23; 89:19;97:11;101:3 educational (1) 10:4 effect (6) 44:10;67:10;69:18; 83:8;89:4;100:23 effects (1) 71:11 effort (1) 74:5 eight (1) 122:19 either (6) 12:21;13:25;22:10; 33:5;70:11;130:3 elaborated (1) 48:12 elements (1) 20:8 else (13) 26:15;43:5;44:13; 46:11,22;49:8;77:2; 86:19;96:11;97:2;98:11; 130:12,22 embarrassment (1) 115:9 emphasis (1) 16:19 employ (1) 48:17 employed (1) 124:12				
		F		
		facility (2) 126:3,18 fact (5) 27:20;42:7;90:16; 91:12;121:11 factors (5) 57:19;58:3,5,6,6 facts (2) 18:25;19:3 faculty (1) 10:5		

failure (1) 52:23	91:16	78:6;103:23;119:15	5,9,10,25;87:2;103:23; 109:22;110:6,21,23; 117:9,14;119:2,15; 120:5,5,8;121:15,18; 122:7,7	gleaned (1) 88:12
fair (1) 74:5	filtered (1) 70:14	footnote (4) 107:22;109:12;112:6; 114:11	God (1) 54:11	God (1) 54:11
fairly (1) 112:2	filtering (2) 69:20;70:2	forbid (1) 54:11	fruits (1) 84:9	goes (6) 28:18;95:23;97:2; 111:16;118:14;125:7
fame (7) 97:18;99:3,8,12,15,22, 25	filters (5) 69:4;70:4,7;71:12,13	forget (2) 50:17;122:16	full (7) 4:8;69:4;71:4,12; 73:24;108:20;109:18	good (6) 16:13;34:23;54:10; 59:6;75:20;105:10
familiar (20) 76:8,12,15,18,21,25; 78:17,24,24;79:3;83:5; 87:22;93:20;94:15; 97:21;99:2,14;100:7,10, 14	final (1) 12:13	forgot (1) 61:12	function (2) 95:16;125:8	goods (1) 120:13
familiarity (1) 116:3	finally (1) 56:21	forgotten (1) 101:14	fundamental (1) 14:22	GOTT (20) 5:21;35:21;37:7,14; 46:8;51:25;52:11;54:18; 56:4;57:23;58:13;59:5; 80:8;109:4;112:24; 113:5,9;118:2,6;132:5
famous (6) 97:16,22;98:2,9,24; 100:25	find (4) 11:2;19:17;21:4; 125:24	form (10) 22:5,6;52:3,11;62:6; 85:13;88:6;112:17; 121:21;127:6	fundamentally (1) 26:16	graduate (4) 7:15;8:11;10:2;28:19
famousness (1) 99:18	finish (1) 118:6	format (8) 18:3,7,13,21;100:15, 16,18;101:9	further (3) 17:19;63:19;128:19	graduated (2) 8:15;10:4
far (1) 98:6	finished (1) 48:7	forward (2) 29:11;89:7	future (5) 28:8;74:21,24;75:4,15	grains (2) 77:18;84:9
fat (4) 77:6;81:18;83:19,25	first (20) 4:2,22;15:7,17;16:9; 18:14,22;19:23;21:14; 25:14;39:6;43:14;46:19; 56:7;106:17;107:3,4; 111:9;119:12;131:5	found (4) 17:5;36:2;58:16; 110:14	G	grams (2) 81:18;82:11
fatally (1) 40:18	fit (1) 72:21	Foundation (3) 5:21;57:23;78:8	GAF (2) 82:4,23	grapes (1) 130:11
fats (2) 82:11,18	fits (1) 54:9	founded (1) 9:9	gained (1) 124:22	great (1) 28:2
favorable (1) 102:7	five (2) 30:3;122:24	four (9) 9:2;10:6;58:3,5;94:6, 8,10;107:2;114:11	gatekeeper (5) 69:11,15,19;70:11,14	greatly (1) 126:13
features (1) 18:11	flaw (1) 23:20	frame (3) 47:18,18;87:9	gather (1) 88:14	grocery (3) 84:18;85:6,11
Federal (3) 15:10;114:8,12	flawed (4) 25:17;26:16;40:18; 119:18	framework (1) 15:11	gathering (1) 88:16	group (5) 8:19;9:5,6;20:18; 29:25
feel (2) 26:19;32:19	flaws (1) 23:20	fraught (2) 6:13;24:8	gave (4) 54:10;112:16,18,19	grow (2) 130:21;131:8
feelings (1) 102:7	floor (1) 127:21	free (1) 26:19	General (9) 8:14,18;10:12;31:10; 48:3,13;65:17;101:6; 125:2	growth (1) 130:21
feels (1) 23:3	focus (3) 11:10,13;119:14	freezer (3) 85:17,21,25	generally (35) 6:9;30:7;33:24;35:16; 49:12;50:4;68:5;71:5; 77:5,9,13,17,21,25; 78:11,21;79:12,18; 82:19;83:10,19;84:3,6; 87:22;89:3,24;90:8; 91:2,3,6;92:3;97:24; 117:14;121:16;131:22	guess (13) 31:20,24;33:14,20,22; 35:5;36:21;37:5;41:3,6; 70:15;83:17;124:24
fell (1) 49:15	focused (3) 111:17,19;120:16	frequently (1) 18:9	gets (2) 44:2;52:16	guessing (4) 20:16;22:14;40:8; 117:19
felt (5) 16:24;23:19;36:12; 53:7;131:3	focusing (1) 8:8	Friday (1) 11:3	GFA (3) 59:25;122:18;123:10	guest (1) 10:8
few (4) 62:24;96:22;113:18; 124:9	follow (2) 58:15;90:20	front (4) 37:25;51:20;62:20; 96:24	GFA's (1) 61:24	guidance (1) 12:17
fiber (1) 84:3	following (2) 48:3;58:9	frozen (111) 26:25,25;27:12,13; 30:18;38:8,25,25;41:13, 18,20;53:11,12,20,20; 54:4,13,14;61:19;62:5; 63:10,14,15;74:17; 75:17,18;76:5,9,13,15, 19,22,24;77:4,5,8,9,12, 13,16,17,20,21,24,25; 78:6,10,11,12,17,20,21, 25;79:4,8,8,11,12,13,17, 18,19;82:5,23,25;83:5, 10,19;84:2,5,9,12,13,16, 17,20,21,24,25;85:2,5,7, 9,11,16,20,22,24;86:2,4,	generates (1) 6:18	Guide (2) 14:24;15:9
field (5) 5:20;6:4;7:3;12:8; 49:16	follows (2) 4:4;38:7		gentleman (1) 111:15	guidelines (9) 24:6,11;25:24;48:3; 56:19;57:4;58:2;128:9; 131:23
fielded (1) 12:14	follow-up (3) 40:20;72:11,15		given (7) 10:19;33:3;48:2; 87:10;96:25;111:8,10	half (2) 18:18;113:5
fielding (1) 12:15	fond (1) 28:20		gives (3) 39:22;53:22;111:11	
Fifteen (1) 123:17	food (19) 27:2,13,23;38:25; 41:18,21;53:12,20; 54:14;75:18;79:8;81:11; 85:2;86:25;87:2;109:22; 110:10;117:14;122:7			H
filter (6) 70:10,23,25;71:4,4;	foods (6) 30:18;41:13;75:18;			

halfway (1) 119:12	8:8	imprecise (1) 19:20	13;66:18	intercept (6) 92:3,7,14;93:2,13; 125:18
handed (1) 111:15	91:14,15	impression (1) 107:16	7:19;10:3,7	interested (3) 74:14;91:7;121:7
handing (2) 109:9;113:15	6:2,25;17:17;99:24	impressions (1) 5:10	105:12;106:6,9	interesting (1) 56:23
handled (3) 31:23;32:2;37:5	74:2	improper (1) 94:22	42:3	intern (1) 8:18
handles (1) 45:13	12:12;85:4;99:24	improve (3) 79:14;81:21;82:12	81:5,9	internally (1) 49:14
hands (1) 73:24	96:10	inadequately (1) 35:6	61:20	internationally (1) 105:7
happened (2) 27:19;117:18	27:21	inappropriate (2) 36:18;58:17	30:25;31:13	interpreted (1) 87:5
happens (1) 96:20	75:9	inappropriately (1) 35:20	43:6	interrupt (1) 8:22
hard (4) 24:14;50:17;54:2,3	113:5;122:10	inartfully (1) 115:16	6:21;11:24;24:16; 28:4;106:6,8	interview (8) 31:9;32:20;33:9;41:8; 47:14;48:25;97:3; 125:23
head (1) 128:3	122:14,24;123:7,8,23	incentive (1) 33:3	34:18;129:17	interviewed (1) 125:10
heading (2) 30:4;118:11	53:11	incidence (3) 125:9,23;126:16	34:14	interviewer (4) 8:12;19:16;32:21; 54:16
Health (1) 8:12	34:20	include (3) 43:9;90:13;108:3	20:20;22:20;35:2	interviewers (1) 126:20
healthful (8) 78:2,6;80:25;81:5; 82:14,20,25;83:10	67:9	included (9) 42:18;66:6,11;67:2, 18,22,25;105:2;108:5	inherent (1) 42:5	interviewing (5) 48:20;58:9;126:3,18; 131:14
healthy (1) 79:20	Hungry-Man (1) 76:12	includes (2) 38:9;65:13	initial (3) 17:5,20;22:11	into (16) 4:21;5:24;19:18;28:7; 31:14;32:12;36:10; 37:16,17;39:21;44:14; 50:11,25;52:16;69:19; 74:23
hear (1) 18:25	hydrogenated (5) 81:14,15;82:9,10,18	including (3) 71:11;91:15;123:18	initially (2) 13:16;47:23	introduce (2) 82:5,24
heard (15) 18:7;27:4;38:9;63:3, 15;69:14,23;70:4,5; 72:24;93:23;103:18; 105:4;106:5,8	hypercritical (1) 46:2	inclusion (2) 65:11;67:14	insert (1) 96:9	introduces (1) 39:9
hearing (1) 18:3	hypocritical (1) 45:17	inclusive (20) 29:24;65:3,7,8,13,18, 22,24;66:10,16,19;67:5, 11;91:17;107:11; 108:11,24;115:19; 116:7;117:6	Insofar (2) 42:20,23	invariably (1) 34:11
heat (1) 116:4	hypothetical (8) 66:2;95:3;103:7; 120:10,15;121:22,24; 125:5	Incomplete (6) 65:25;95:2;103:6; 120:9;121:21;125:4	instance (2) 40:10;122:5	invite (2) 118:9,15
heaven's (1) 31:17	I	incorrect (1) 23:25	instances (4) 12:8;23:19;24:3;119:5	Invoice (1) 124:3
heck (1) 39:11	idea (10) 73:15,18;77:7,19; 78:3,9;79:16;98:25; 106:4;123:13	increase (1) 130:16	Institute (1) 7:21	involved (22) 6:22,23;12:4;13:6; 14:7;15:18;21:15;25:4; 30:17;48:20;60:24;64:5; 96:23;103:18;104:16; 110:25;115:6;116:20; 117:9;119:25;120:13; 128:23
Heinz (4) 62:11,16;107:15,17	identification (2) 109:8;113:14	increasing (1) 13:22	instrument (4) 31:23;35:4,19;37:6	involving (8) 8:17;88:22;93:9;99:3, 15;104:21,25;107:24
held (3) 8:9;17:21;58:25	identify (4) 58:3;66:25;90:14; 109:11	independent (2) 48:17;49:5	integrated (2) 28:7;74:23	Ipsos (9) 105:5,7,10,15,18,23; 106:2,6,9
help (4) 24:17;33:5,8;81:2	identifying (1) 96:6	indicate (2) 82:20;115:2	intellectual (3) 10:11;16:19;32:13	I-P-S-O-S (1) 105:5
helped (3) 15:13;111:7,10	idle (2) 126:19,19	indicated (5) 30:20;48:9;69:23; 74:22;102:17	intend (1) 80:2	
helpful (1) 79:24	imagine (2) 47:16;50:18	indicates (3) 62:25;63:7;72:8	intended (2) 81:2;82:5	
high (14) 44:6,15,21;77:5,9,13; 84:3,6;102:4,5,19,20,25; 103:10	impact (1) 17:17	indication (1) 29:20	intends (2) 29:16;80:5	
himself (2) 56:10,13	implementing (1) 104:17	individual (2) 19:7,10	intensive (1) 27:23	
hired (2) 15:24,25	important (3) 32:15;88:11,18	individuals (6) 30:19;31:13;65:9,10,	intent (1) 120:11	
history (1)			intention (4) 27:17;28:7;74:23; 102:6	
			intentionally (1) 35:14	
			interaction (1) 16:10	

irrelevant (1) 44:22	4:9;5:1;6:1;7:1;8:1; 9:1;10:1;11:1;9;12:1; 13:1;14:1;15:1;16:1; 17:1;18:1;19:1;20:1; 21:1;22:1;23:1;24:1; 25:1;26:1;27:1;28:1;10; 29:1;30:1;31:1;32:1; 33:1;34:1;35:1;36:1; 37:1;38:1;39:1;40:1; 41:1;42:1;43:1;44:1; 45:1;46:1;47:1;48:1; 49:1;50:1;51:1;52:1; 53:1;54:1;55:1;56:1; 57:1;58:1;59:1;60:1; 61:1;17;62:1;19;63:1; 64:1;65:1;66:1;67:1; 68:1;16;69:1;3;70:1; 71:1;72:1;73:1;3;74:1; 75:1;76:1;8;77:1;78:1; 79:1;80:1;81:1;82:1; 83:1;84:1;85:1;86:1;13; 87:1;88:1;89:1;90:1; 91:1;92:1;93:1;94:1; 95:1;96:1;97:1;11;21; 98:1;99:1;100:1;101:1; 102:1;103:1;24;104:1; 105:1;4;106:1;11;107:1; 13;108:1;109:1;5;7;9;10; 110:1;19;111:1;112:1;5; 113:1;10;13;15;16;18;22; 24;114:1;6;7;115:1; 116:1;14;117:1;118:1;8; 119:1;120:1;3;17;121:1; 122:1;9;123:1;124:1; 125:1;126:1;127:1;9; 128:1;10;129:1;130:1; 131:1;132:1	102:13;130:4 knows (1) 32:9	39:20;65:23;97:4 level (16) 26:14;44:7,9,15,16,17, 21;102:4,5,19,20,25; 103:2,5,8,10 leveled (2) 45:7;111:5 levels (2) 44:2;79:15 license (1) 20:5 licensed (3) 39:3;40:3,25 lifestyle (1) 79:20 light (1) 45:10 likelihood (43) 18:15;20:23;29:10; 34:11;36:8;42:18;57:5; 17;58:21;60:21;61:20; 63:24;65:19;68:4,10; 87:21;24;88:4,7,10,21; 89:22;90:6,25;91:20; 94:24;100:13,24;101:5; 110:22;118:13;120:6; 121:17;124:6,10;125:2; 19;126:11;22;127:3,23; 131:6,13 likely (16) 22:12;27:12;28:22,23; 33:13;67:9;74:18;75:21; 82:25;84:13,17,21,25; 85:10;86:5;122:6 limit (3) 29:17;110:4;131:3 limited (1) 118:25 limiting (1) 47:10 limits (1) 15:13 line (3) 22:21;82:5;117:23 lines (2) 101:6;126:19 link (1) 5:25 list (3) 10:21;58:2;131:2 literally (2) 87:5,14 litigation (29) 4:20;6:15;11:25;12:6; 13:8,14;14:2,23;15:8,19; 16:20;18:15;21:15,18; 30:7;32:6,8,13;33:17,22; 42:19,25;48:17;56:2; 58:3;60:14,16;87:25; 95:5 little (12) 11:11;36:11,23;37:16; 45:16,17;46:2;56:8,9;	97:4;125:15;126:25 living (1) 30:13 located (2) 85:6,17 long (7) 18:9;45:4;98:17; 111:17,18;113:3;131:25 look (5) 20:22;24:7;31:9; 32:19;50:13 looked (1) 45:18 looking (3) 114:10;118:18;119:8 lose (5) 78:13,22;109:23; 110:7;119:16 losing (1) 81:7 lot (6) 29:2;32:16;126:19; 127:24;128:4;131:25 low (5) 44:16,17;77:22;83:19, 25 low- (1) 119:14 lunch (1) 112:25 Luncheon (1) 113:7
J		L		
Jacoby (6) 111:3,6;115:6,7; 116:21;119:24 job (1) 22:14 jobs (1) 8:8 John (1) 62:20 Johnson (21) 4:24;5:13,18;6:2; 10:15;11:8;35:14,19; 36:4;37:5,13,15;45:12; 46:5;54:24;55:9;62:21; 74:13;121:12;127:10; 128:17 Johnson's (14) 4:24;37:8;45:8,22; 46:15;50:19;52:7,8; 55:2;56:21,25;57:7; 104:17;106:15 judge (2) 108:16;131:19 judges (1) 17:9 judge's (1) 17:20 Judicial (1) 15:10 junior (18) 19:7,11;29:12,13; 74:15;76:4;79:25;89:4; 4,22;90:6,22;94:4,7; 95:18;96:7;121:5,6 justified (1) 128:6 justify (1) 24:14	Kaplan's (2) 37:8;46:9 keep (1) 23:8 kept (1) 23:7 key (2) 90:25;91:12 kind (10) 17:22;19:22;41:22; 46:4;56:11;61:3;82:16; 95:15;101:2;110:10 kinds (8) 11:21;20:16,18;30:11; 32:23;57:15;98:15,18 knew (1) 115:24 knowing (2) 44:14;45:19 knowledge (11) 14:3;32:7;88:7;95:13; 99:22;102:8;103:22; 105:3;106:3;107:21; 124:22 known (6) 15:21;98:3,5,5;	last (5) 7:23,25;109:19; 117:25;124:2 later (5) 5:25;36:11;37:17; 48:23;51:3 Law (5) 9:19;16:19;19:2; 39:15;56:20 lay (1) 28:16 lead (1) 31:8 leading (4) 39:20;42:8;51:25; 52:17 Lean (6) 77:2;78:17,20;80:24; 81:5,6 learn (1) 44:24 learned (2) 130:8;131:20 least (7) 10:20;18:17;24:17; 27:6;35:7;108:12;112:2 leave (2) 50:9;92:20 leaves (1) 44:12 lectured (2) 9:24;10:9 led (1) 129:11 left (2) 22:24;93:3 left-hand (2) 109:18;118:11 legal (5) 18:16;65:14;97:18,18; 106:12 legitimacy (1) 36:20 legitimate (3) 33:13;72:5,7 Leon (4) 4:9;11:9;28:10;117:16 less (3)	level (16) 26:14;44:7,9,15,16,17, 21;102:4,5,19,20,25; 103:2,5,8,10 leveled (2) 45:7;111:5 levels (2) 44:2;79:15 license (1) 20:5 licensed (3) 39:3;40:3,25 lifestyle (1) 79:20 light (1) 45:10 likelihood (43) 18:15;20:23;29:10; 34:11;36:8;42:18;57:5; 17;58:21;60:21;61:20; 63:24;65:19;68:4,10; 87:21;24;88:4,7,10,21; 89:22;90:6,25;91:20; 94:24;100:13,24;101:5; 110:22;118:13;120:6; 121:17;124:6,10;125:2; 19;126:11;22;127:3,23; 131:6,13 likely (16) 22:12;27:12;28:22,23; 33:13;67:9;74:18;75:21; 82:25;84:13,17,21,25; 85:10;86:5;122:6 limit (3) 29:17;110:4;131:3 limited (1) 118:25 limiting (1) 47:10 limits (1) 15:13 line (3) 22:21;82:5;117:23 lines (2) 101:6;126:19 link (1) 5:25 list (3) 10:21;58:2;131:2 literally (2) 87:5,14 litigation (29) 4:20;6:15;11:25;12:6; 13:8,14;14:2,23;15:8,19; 16:20;18:15;21:15,18; 30:7;32:6,8,13;33:17,22; 42:19,25;48:17;56:2; 58:3;60:14,16;87:25; 95:5 little (12) 11:11;36:11,23;37:16; 45:16,17;46:2;56:8,9;	97:4;125:15;126:25 living (1) 30:13 located (2) 85:6,17 long (7) 18:9;45:4;98:17; 111:17,18;113:3;131:25 look (5) 20:22;24:7;31:9; 32:19;50:13 looked (1) 45:18 looking (3) 114:10;118:18;119:8 lose (5) 78:13,22;109:23; 110:7;119:16 losing (1) 81:7 lot (6) 29:2;32:16;126:19; 127:24;128:4;131:25 low (5) 44:16,17;77:22;83:19, 25 low- (1) 119:14 lunch (1) 112:25 Luncheon (1) 113:7
K				M
Kaplan (167)				ma'am (6) 59:24;73:6;74:9; 93:18;100:17;101:7 magnified (1) 31:14 Maid (3) 15:23;16:4;17:6 maintain (2) 79:20;81:2 maintaining (1) 81:7 major (1) 56:19 majority (5) 13:23;48:15;98:3; 99:3,15 makers (1) 130:20 makes (2) 32:19;72:3 making (3) 17:3,4,14 mall (8) 92:3,7,11,14,25;93:12; 125:18;126:3 manner (5) 31:10;57:2;69:14; 72:9;124:13

Manual (4) 14:22;25;15:8;58:2 many (15) 12:3;25;20:10;81:20, 24;84:8;88:18;23;89:16, 25;90:9,14;91:4;96:8; 102:13 Marie (1) 76:21 mark (27) 29:6;46:7;89:23;90:2, 7,11,15;91:5;94:23; 95:9;97:16;98:3,5,5,9, 20,24;100:19;101:10,17, 21;102:10;104:22; 109:4;113:9;129:6,13 marked (9) 4:23;5:13;54:23; 55:10;109:6,10;113:12, 16;127:9 market (30) 29:14,17;33:16,20; 76:10;79:4;87:20;88:3; 89:5,10,13,15;95:7; 103:25;104:5,9,13,21, 25;105:8,11,20;110:9; 118:12;121:5,7;125:25; 129:25;131:8,16 marketing (14) 4:19;8:19;9:21;11:22; 28:21;32:3,5,8,9;33:24; 58:18;87:25;88:9; 129:21 marketplace (13) 33:25;34:2;47:2,5,12; 64:20;86:23;87:8,14; 89:23;90:8;95:25;98:21 markets (1) 130:22 marks (5) 61:5,9,10;64:19; 104:25 mark's (1) 29:7 mass (1) 84:22 massive (1) 6:16 Master's (1) 7:16 match (1) 112:23 material (1) 44:10 matter (11) 5:6;6:24;11:2,4;38:15; 59:22;60:14,16;108:16; 116:2;131:6 maxed (1) 130:13 may (18) 11:3;19:20;22:11; 23:24;27:21;30:13;39:5;	41:16;58:17;68:19; 71:13;86:8;87:2;92:9; 102:13;110:9;118:6; 126:2 Maybe (6) 30:16;33:19;47:16; 67:7;75:25;125:15 MBA (2) 7:22;8:3 McCarthy (3) 15:5,11;101:3 McCarthy's (1) 101:8 meager (1) 36:7 meal (35) 27:12;53:11;54:5,14; 63:10,14;75:22;76:9,13, 16,19,22,24;77:4,5,8,12, 13,16,17,20,21,24,25; 78:6,10,11,17,20,25; 79:4,11,12,18;85:16 meals (43) 38:9,25;53:20;61:19; 62:5;63:16;74:17;76:6; 77:9;78:12,21;79:8,13, 17,19;84:12,13,16,17,20, 21,24,25;85:5,7,9,11,20, 22,24;86:2,4,5,9,10; 110:21,23;117:9;120:5, 8;121:15,18;122:7 mean (16) 11:19;24:9;30:24; 48:22;69:7;70:16,19; 86:22;87:8;90:12; 101:24;103:11;111:8; 112:8,9;123:12 meaning (2) 65:3,7 meaningful (4) 31:15;32:14,15;71:14 meaningless (4) 6:18;43:7;55:19; 125:14 means (10) 22:13;39:12;40:17; 69:5;70:7;97:22;98:2; 102:10;129:24;130:7 meant (4) 43:15;46:18;80:12; 103:4 measure (3) 20:25;21:3;27:18 measuring (2) 125:19;126:11 medical (1) 43:2 meet (2) 6:14;65:11 member (1) 19:7 members (1) 67:12	memory (9) 50:16,24;51:14,23; 52:7,14,15;75:21;96:21 mention (2) 15:7;69:16 mentioned (8) 16:8;42:14;51:10; 78:16;80:21,23;82:17; 111:3 mentioning (1) 90:18 mentions (1) 39:6 merchandisers (1) 84:22 met (1) 49:3 methodologies (2) 5:20;14:19 methodology (4) 15:14;18:22;28:11; 124:12 methods (6) 7:18;9:25;10:8,13; 49:13;86:16 might (11) 27:25;40:3;48:4; 52:16;54:5,5;57:16; 67:9;69:12;75:23;96:25 millions (1) 31:12 Mills (2) 8:14,19 mind (8) 47:18;53:23;65:14; 66:17,20;77:3;86:15; 87:9 mine (1) 28:23 minerals (1) 82:16 minimize (1) 38:22 minimum (2) 6:14;86:21 minor (1) 7:17 Minute (3) 15:22;16:4;17:6 mirror (2) 86:16;87:14 mirrored (1) 87:16 misleading (1) 17:13 misplaced (1) 36:5 misremembering (2) 115:23;116:5 misspoke (1) 80:12 modality (1) 125:10	moment (1) 70:16 money (2) 43:18,20 Montclair (1) 10:9 month (1) 53:25 month/30 (1) 53:21 months (1) 109:23 more (24) 22:10,12;27:11;28:8, 15,15;36:10;40:7;43:22; 45:13;54:3;58:22;71:19, 24;86:18;87:10;102:16; 111:20;128:4,8,9;130:8, 18;132:3 morning (2) 59:6,7 most (5) 18:12,17;47:18;100:8; 130:2 motivation (1) 36:4 move (3) 37:22;112:4;116:13 moved (1) 17:10 moving (1) 34:10 much (15) 13:16;17:22;30:25; 36:18;44:4,20;50:24; 56:13;67:10;70:17;87:3; 123:4,9;125:17,24 multiple (1) 46:17 must (1) 13:13 myself (1) 99:24 <div>N</div> name (17) 4:8;15:20;19:12;20:6; 22:25;38:8;40:2;42:6, 10;50:13;60:4;61:12; 78:23;80:23;81:9;90:18; 103:21 named (1) 39:2 names (5) 20:2;40:22;41:16; 47:10;61:5 narrative (1) 116:12 naturally (2) 81:18;82:10 nature (2) 34:7;42:8	naught (1) 132:2 necessarily (11) 21:24;43:3;67:14; 72:2,17;75:23;85:16; 90:16;92:5;96:23; 100:22 need (13) 18:25;24:12;26:19; 34:21,22;39:17;42:22, 24;52:18;62:23;87:14; 117:19;125:24 needs (1) 42:18 needy (1) 43:22 negative (3) 68:6;75:20;106:5 New (4) 7:13;15:23;74:4;118:5 next (3) 27:14;74:18;110:3 nice (3) 20:16;33:4;120:15 niche (1) 129:24 nine (1) 64:2 noise (6) 20:15,25;21:4;22:14, 23;42:6 nonetheless (1) 115:20 nonresponsive (1) 116:12 nonsense (1) 24:15 Northwestern (1) 131:12 notable (1) 107:4 Notary (1) 4:3 noted (10) 25:16;54:19,21;58:24; 59:3;97:8,10;113:6; 125:7;132:7 notice (1) 121:25 notion (2) 86:23;95:23 Nowhere (2) 127:16;128:10 Nuance (2) 60:6,8 N-U-A-N-C-E (1) 60:8 Nuance's (1) 61:11 number (12) 12:20;21:7;30:23,25; 31:5,13;43:7;44:7,9; 106:11;114:5;115:3
---	---	---	---	---

numbers (15) 6:18,19;26:9,10,12; 30:21;42:11;43:21; 55:19;112:15;113:20; 114:4,5,7 numerous (2) 97:12;124:6 nutrients (1) 82:2 nutritional (1) 82:13	one (52) 8:13;10:25;11:3; 16:23;17:9;20:12;25:14; 34:8,10;38:13;39:8,25; 41:13;46:11;57:16; 59:21,21;64:22;69:13, 15,18;74:6;78:12,13,21, 22:79;10:13,14,19,19; 85:22;93:7;94:8,10; 96:13;102:9,9,12,13; 104:4,8,12;106:22; 108:13,17;111:20,21; 112:4,18;129:19;130:15 Ones (52) 27:3;29:7,18,19; 38:10,10,12,15;39:4,10, 16;40:10;41:24;45:15; 46:7;51:17;61:19,23; 62:4,10,15;63:3,15; 69:16,24;78:25;79:4; 80:5;83:5,9,18;84:2,5,8, 13,17,21,25;85:7,11; 86:2,5,10;98:24;99:19; 101:17;103:13,19; 105:18;110:23;120:7; 121:18 Ones' (1) 101:21 one's (1) 79:14 only (7) 22:24;34:25,25;88:9; 98:16;100:6;127:13 open (1) 9:8 open-ended (6) 39:24;40:9,11,12; 45:14;69:13 openers (1) 39:7 Opinion (43) 9:3;26:2;27:6;28:13; 29:4;33:18;35:3,13,18, 22;37:4,8;38:3;42:17; 43:11;47:3;49:9,24; 52:4,25;53:3;55:13,15, 18,21;58:11;61:17;71:6; 78:5;87:13;109:16; 112:11,17,22;114:4,21; 115:3;117:20;118:9,13; 119:11;121:14;131:6 opinions (8) 6:2,25;7:6;17:17; 31:22;47:21;56:17; 128:16 opportunity (3) 39:23;105:14;124:17 opposed (3) 31:12;39:24;110:8 Opposers (1) 109:10 Opposers' (6) 109:5,7;113:10,13,16,	18 opposing (3) 21:16,21;113:19 opposition (4) 6:22;121:25;122:2; 129:11 option (7) 53:24;54:10;71:11,17, 22;72:3,23 options (1) 71:6 order (2) 25:21;61:3 ordinary (1) 86:17 organization (1) 49:5 organizations (1) 48:20 original (2) 22:9;24:21 others (6) 28:12;41:15;45:24; 96:8;105:11;124:22 otherwise (2) 61:6;95:6 out (32) 6:12;13:25;15:9; 19:19,23,24;20:3,5,24:5; 27:23;28:17;33:5;38:12; 66:5,12;70:4,14,23; 75:22;91:16;92:20,23; 93:4;99:24;112:11,25; 124:14;125:24;127:24; 130:13,25,25 outcome (5) 17:18;31:18;43:6; 44:24,25 over (32) 22:21;65:3,7,8,12,18, 22;66:5,10,11,16,19; 67:2,4,11,17,22,25; 91:17;108:24;110:16; 111:16,22;115:19; 117:5;120:6;121:16; 124:6;125:12,16; 126:25;130:9 overall (2) 15:11;75:24 overbroad (1) 110:21 overhead (1) 126:5 overly (3) 115:18;116:8;122:8 Oversight (2) 73:15,18 own (3) 17:17;23:18;73:4 owned (4) 39:4;40:3,25;107:17	P packaging (1) 23:2 page (28) 26:21;30:3;47:24; 57:25;63:5,6;64:2; 106:25;107:2;109:14,16, 16,17,17;111:4,12,14; 112:19;113:20;114:3,5, 5,7,11;115:2;118:10,14; 119:6 pages (4) 111:17,18;112:11,22 pains (1) 33:12 paragraph (6) 6:12;47:24;52:23; 57:25;109:18;119:12 parallel (1) 19:17 paraphrase (1) 27:13 Pardon (2) 26:5;73:16 part (15) 13:22;36:14;42:3; 43:24;52:21;65:10; 66:19;71:7;73:15; 114:19;129:7;131:12,14, 16;132:2 partially (2) 81:15;82:9 participated (3) 12:21;48:24;49:8 particular (9) 16:19;29:22;63:4; 98:20;102:6,18;111:13; 112:11;125:25 particularly (2) 22:16;36:24 particulars (2) 83:24;115:23 parties (1) 117:12 parties' (1) 64:19 party (3) 48:18;49:4;107:19 party's (1) 21:17 passage (1) 36:23 passionate (1) 40:14 past (18) 27:2,8,10,18,18;28:6; 53:13,21;54:5,15;63:10, 14;74:20;75:19;88:25; 108:10;109:22,24 pay (1) 33:4	pen (1) 32:21 people (48) 17:16;20:19;21:5; 28:15,21,22;29:5,17,25; 30:11,11,22,24;31:4,5, 12;32:12,17,19;33:10; 34:3,3,4,5,7,15;47:12; 48:15;50:18;66:21;67:8; 74:17,19;79:7;92:8; 98:4;100:25;102:13,21, 22;117:13;119:14,15; 121:9;122:6;125:9; 131:4,10 perceived (2) 22:12;33:6 percent (6) 63:8,13,24;102:16; 103:2,9 percentage (8) 12:25;13:7;21:8;44:7; 66:15,25;67:17,24 percentages (1) 31:15 perception (2) 15:25;55:25 perceptions (1) 30:14 perfect (2) 34:22;117:17 performed (1) 21:11 perhaps (2) 22:15;75:10 permission (1) 20:5 persist (1) 117:22 person (19) 19:6,16;26:24;33:4,8; 39:13;41:20,23,25; 48:24;49:3,7;51:7; 54:12;57:22;58:12,18; 86:17;87:9 personally (3) 12:21;13:6;53:19 persons (6) 58:9;61:18,22;62:3,9, 14 perspective (3) 25:15;96:17;130:18 pharmaceutical (1) 11:24 PhD (2) 7:19;8:24 Phil (6) 37:4,13,15;52:8;55:2, 9 phone (6) 47:13;51:9,11;52:5; 87:4;126:19 phrase (1) 39:9
--	--	--	---	--

physical (1) 47:9	91:16	115:14	12:8;15:10;40:2; 71:14,19,24;72:11;126:9	puts (1) 20:3
piece (1) 95:5	practice (8) 24:11;30:8,10;89:24; 90:9;91:2,3,7	procedure (5) 24:2;49:10,25;50:3,8	provided (5) 10:22;14:9;59:25; 60:5;113:23	putting (1) 29:21
pinpoint (6) 111:12,14;112:5,9,18, 19	practices (1) 87:22	procedures (5) 48:14;57:4;58:10,15, 16	provides (5) 24:16;71:17,22;72:8; 105:20	Q
place (6) 48:14;91:8;119:10; 125:12;130:12;131:11	precede (1) 69:12	proceeding (6) 103:17;104:2,6,9,14; 122:2	providing (1) 72:22	qualifications (6) 27:6;57:21;127:17,21, 22;128:12
placebos (1) 43:4	precedes (1) 38:22	proceedings (3) 14:6,6,10	proximity (1) 85:10	qualified (6) 20:18;56:13;58:8,12, 19,20
plaintiff (2) 23:3;116:15	prefatory (1) 52:24	process (3) 29:22;47:22;98:13	psuedo (2) 86:25,25	qualify (2) 19:6;70:25
plant (1) 130:15	prefer (3) 32:17;70:15;92:9	produce (1) 130:17	Psychological (8) 9:16,21;16:16;86:21; 87:7,15;95:23,24	qualifying (1) 71:3
please (13) 5:14;31:20;35:25; 37:25;68:21;80:9;90:4; 106:25;113:10;118:6, 19;120:18,20	preparation (1) 123:19	produced (2) 29:23;130:11	psychologically (1) 47:15	quality (1) 105:12
Pleasure (1) 18:14	prepare (3) 5:18;11:16;56:13	product (39) 12:14;19:11,24;20:5; 21:5;28:22;34:14,18,23; 35:2;47:9,9;61:11;75:9; 10:80:14;82:13,15,20; 88:24;89:4,5,17;90:19; 94:5,8,9,24;95:6,10,14, 17,18,19;96:5;129:21, 24;130:14;131:11	psychologist (4) 8:20;9:2,15;15:4	quarter (1) 13:10
plus (1) 63:20	prepared (5) 5:15,17;127:14,19; 128:15	products (47) 19:24,25;76:9,13,16, 19,22,24;77:4,5,8,12,13, 16,17,20,21,24,25;78:2, 6,10,11,17,20,25;79:5, 11,12,18;80:2,5,18,25; 81:14,18,21,25;82:8; 83:11;85:2,16;94:7; 117:8;129:15,19;130:20	psychology (11) 7:14,17,19;9:19,19; 10:3,3,4,7,7;16:18	quarters (2) 13:3;64:9
pm (4) 97:8,10;113:6;132:7	presence (1) 53:23	product's (1) 61:12	Public (2) 4:3;8:12	quasi (4) 70:7,10;71:4,12
point (13) 9:7;16:22,24;17:2,4, 14;58:23;108:6;111:25; 115:5,5,16;127:24	presented (1) 16:17	professional (1) 9:12	purchase (19) 27:10,12,17,18,19; 28:5,7;74:18,22,23;75:3, 12,14;78:12,22;79:13, 19;100:8;122:7	questionnaire (3) 32:22;41:11;44:20
pointing (1) 112:11	President (2) 4:14;9:5	Professors (7) 15:4;16:11;28:19,23; 69:8;111:2,3	purchased (24) 26:25;28:6;38:15; 53:10,11,18,19;54:4,13; 63:9,14;69:25;70:3; 74:19;75:10,11,17; 88:24;89:17;99:11; 109:22;110:5;117:14; 118:25	questionnaires (1) 28:17
points (1) 98:16	pressed (2) 54:2,4	profitability (1) 130:22	purchaser (1) 86:15	quickly (2) 51:2;68:20
poisoning (1) 27:24	presuming (2) 72:14,17	proper (5) 26:13;57:3;58:9,15,16	purchasers (14) 27:8;30:2;74:14,17, 21;76:4,5;88:17,19,22, 24;110:20;120:4;121:15	quiet (1) 53:25
poor (1) 22:13	pretty (5) 36:18;45:11;46:14; 50:25;125:24	properly (6) 37:12,13,15;57:2; 125:6;128:9	purchasing (1) 75:4	quite (1) 124:9
poorly (1) 33:7	previously (5) 4:23;5:13;72:25; 90:23;94:21	property (3) 10:11;16:20;32:13	Purdue (2) 7:18,20	quote (2) 72:18,18
population (1) 31:10	price (2) 41:16;125:25	proposed (1) 43:15	purpose (3) 92:9;95:20;96:19	R
portion (2) 45:18;66:16	primarily (3) 4:17;13:21;34:6	prospective (9) 74:14,17;76:4,5; 86:15;88:17,19,22,23	purposes (4) 30:6;33:17,18;88:9	raised (5) 36:3;47:23;107:5; 113:19;115:25
pose (1) 69:21	Princeton (7) 4:11,15;9:4,8;11:11, 12;12:3	protective (1) 61:3	push (1) 32:12	range (5) 98:4;125:2,15;126:21, 22
position (2) 9:3;17:8	principal (1) 12:17	protein (1) 84:6	pushed (1) 34:9	rare (3) 127:7,7,8
positions (4) 8:8,13,17;32:12	print (1) 112:25	prove (1) 86:14	pushing (1) 35:14	rate (1) 122:13
positive (1) 106:8	prior (2) 93:23;95:10	provide (8)	put (10) 15:9;19:14,19,23,24; 20:5;41:15;75:22;87:8; 92:15	rather (1) 38:13
possible (2) 22:20;64:13	probably (10) 12:23;13:4,9;14:20; 18:17;41:19;64:21; 92:22;123:6,13			ratios (3) 81:22;82:12,19
post (2) 91:14,15	probative (2) 6:17;55:19			reach (1) 7:8
post-doc (1) 7:20	problem (7) 8:23;21:6;41:24; 65:23;115:8,21,24			read (26) 5:10;17:23;35:9; 44:12;50:3,12;55:6,9,14; 56:22;57:6;80:8,10; 92:10;105:16;106:19; 107:6,23;109:25; 110:12;117:3,19;118:9,
potential (2) 63:2;88:13	problems (5) 24:9,9;25:20;52:17;			
potentially (4) 31:14;52:17;74:19;				

15,20;120:23 Reader (2) 61:11;108:6 reading (7) 20:9;36:8;50:11,14; 55:16;56:25;101:14 reads (3) 107:3;110:3;116:7 real (5) 58:14;67:5;96:20; 129:14,19 really (22) 6:11;10:12;13:16; 17:10;23:22,25;24:12; 32:10,14;36:21;58:18; 73:24;74:2;77:11; 105:25;108:25;109:3; 116:8;120:15;130:5,24; 131:20 reanalysis (1) 17:7 reason (9) 20:24;30:18;31:4; 42:9;92:9,12;96:13; 101:11,19 reasonable (2) 6:3;7:2 reasonably (1) 10:16 reasons (2) 21:9;42:12 rebuttal (10) 22:6;23:6,14,17;25:5, 11;73:11,20,22,24 recall (10) 18:2,5;26:23;35:12, 16;43:8;45:5;51:4;53:3; 117:17 receipt (1) 129:11 received (1) 127:19 recent (1) 71:10 recess (3) 54:20;97:9;113:7 recited (1) 105:17 recognize (2) 4:25;113:22 recognized (4) 100:20;101:11; 103:13;105:8 recollection (4) 25:7;46:21;115:7; 121:13 recommended (3) 22:2,9;24:20 record (5) 54:22;59:2;80:10; 118:20;120:23 redefined (1) 25:18	redo (2) 25:22;26:4 reduced (1) 63:23 refer (2) 26:19;62:23 Reference (5) 14:24,25;15:8;47:18; 112:20 references (1) 56:11 referring (1) 107:9 refers (2) 107:23;114:17 reflect (5) 36:7;112:15;113:21; 114:6,8 reflected (1) 128:7 reflects (4) 19:12;32:2;33:7;46:3 regard (6) 14:22;34:25;47:4; 49:25;70:17;119:18 regarding (1) 30:8 regardless (2) 64:18;94:20 regards (1) 36:3 rehabilitate (1) 26:12 rejected (4) 14:2,14;25:6;59:10 related (1) 9:24 relates (5) 65:3;69:9,10;70:10; 81:6 relationship (6) 19:22;20:3;34:17; 42:24;83:22;102:9 relationships (1) 46:18 relevance (1) 39:8 relevant (13) 20:24;21:9;39:15; 42:10,11;45:18;58:5,6; 65:14;67:12;88:15,16; 124:13 reliable (1) 86:18 reluctant (1) 33:10 remarked (1) 17:9 remember (19) 17:9;20:9;45:23; 46:25;53:6;54:2,4,8,13; 61:9;73:2;98:17;101:13; 106:10;121:5;122:21,	22;123:12,14 remove (3) 49:22;50:4;94:17 removed (3) 19:14;94:19;95:13 removing (1) 52:8 repeat (4) 71:21;90:3;118:18; 120:21 replicate (3) 23:22;24:15,21 replication (2) 22:9;26:8 report (48) 4:22;5:15,17;7:6; 10:16;11:6,9;16:2; 26:19;30:3;35:9,23; 37:10,19;46:9,16;47:21, 23;49:18;54:23;55:2,6; 57:25;62:25;63:7,18; 64:3;99:21;106:12,20, 23;107:2;108:4;109:12; 111:24;112:6,20;113:2; 114:10,23;122:15,20; 127:10,13,16;128:11,16; 131:18 reporter (4) 80:11;114:8;118:21; 120:24 reports (3) 11:17;124:18,21 representation (1) 87:7 representative (1) 111:5 representativeness (2) 86:22;95:24 repurchase (1) 102:6 reputation (1) 105:11 requalify (1) 49:2 require (4) 39:25;40:9;51:22; 52:14 requirement (2) 29:19;51:13 requires (1) 52:6 requiring (2) 45:14,15 Research (72) 4:11,16,17,18,19,19, 20:5;20:7;17,21;8:10,19, 20:9;2,4,5,8,22,24;10:8, 11;11:11,12,20,21,22,23, 25;12:3;13:20;14:24; 15:9;16:3;28:11;30:16; 32:3,5,8,8,9,17;33:16; 42:25;43:2;44:11,12; 47:6;58:18,21;71:10;	72:8;87:20,23,25,25; 88:4,9;95:5;103:25; 104:5,9,13,21,25;105:8, 11,12,15,18,21;118:12; 127:25 researched (1) 103:16 researcher (1) 12:17 resolve (1) 24:18 respect (2) 69:5;70:7 respected (1) 100:25 respondent (18) 33:6;39:14,25;40:20; 45:15;47:16;48:23; 49:22;51:11,14,19;52:6; 71:13;72:15,16;94:20; 96:10;97:5 respondents (44) 30:5;32:11;33:8,20; 35:15;36:19;38:8;63:2, 8,22;66:5,12,25;67:17, 22,24;70:24;71:7,18,23; 72:3,9;89:16,25;90:10, 14;91:4,17,22;92:4,14; 93:3,16,20;94:14,23; 95:10;96:14;102:17; 110:9;125:9,20;129:5,12 respondents' (1) 96:3 response (10) 35:15;52:22;68:6; 71:7,20,25;72:6,23; 116:11,12 responses (5) 66:11;68:5,8,14,25 responsibilities (1) 12:14 responsive (5) 21:23;22:2,6;25:4,5 rest (1) 44:23 restate (1) 68:19 restricting (3) 27:7;29:5;121:9 restriction (1) 121:11 result (2) 75:9;103:3 results (10) 64:13,18,22;65:19; 66:9;68:3,12,23;99:6,10 resume (1) 10:14 reverse (3) 89:9,11,14 review (2) 105:15;124:18 reviewing (1)	124:21 richer (1) 28:9 right (19) 7:13;11:14;17:16; 24:13,17;25:23;43:19; 49:7;50:5,20,25;70:19; 99:19;100:5,12;122:17, 22;123:3;131:21 rightfully (1) 66:21 right-hand (2) 109:15;119:11 role (1) 70:11 rule (1) 92:23 rules (2) 15:12,13 run (1) 25:14
S				
Sabol (32) 4:23;6:7,20;26:23; 28:14;30:20;31:23,25; 32:2;35:24;36:3,17; 40:5;42:15;43:25;46:16; 47:25;50:15;51:4,5; 52:5;54:25;55:7,10,14, 15,25;58:12;73:25;79:6; 91:25;121:12 Sabol's (40) 5:2,9,16;17:23;26:18, 22;29:4,15;31:21;35:4, 9;36:7;37:18,22;43:8; 45:4,10;46:25;47:21; 49:10,18;51:12;52:21; 55:3,16;57:6;61:19; 62:20,25;63:7,13;69:12; 74:7;99:17;100:4; 105:17;106:16;107:11; 127:17;128:11 sake (1) 31:17 sale (2) 28:2;75:11 same (19) 20:18,21;23:8;41:19; 48:14;51:17;68:5;84:14; 85:6,21,25;86:20;89:18; 113:23;119:10;120:25; 121:20;126:7,16 sample (8) 30:4;31:2,15;66:15; 67:8;124:15;125:15; 126:16 sampling (1) 24:2 saw (1) 19:24 saying (7)				

27:4;28:20;53:13,15, 16;108:7,8 schedule (1) 11:4 School (6) 7:22;8:11;10:2,10; 28:19;32:23 science (3) 4:18;32:17;43:2 scientific (1) 14:25 scope (3) 46:9;116:25;117:5 scratch (2) 24:22;25:6 screen (4) 19:6;70:23;91:14,16 screened (1) 79:9 screener (4) 53:8,19;54:12;67:19 screening (7) 38:18;49:3;66:6,24; 67:20;71:3;90:13 screens (1) 79:10 second (3) 8:16;43:15;58:7 seconds (1) 96:22 section (11) 27:2,14;38:25;53:12, 20;54:14;75:18;79:8; 85:17;118:15;122:8 seeing (1) 86:9 seeking (1) 42:23 seem (3) 24:10;48:2;120:25 seems (4) 18:16;43:14;45:24; 56:9 segment (3) 67:5;129:25;130:3 selection (1) 29:22 sell (4) 41:15;130:10,25,25 Senator (1) 20:7 senior (24) 8:25;29:6;75:13,23; 89:12,15,17;90:2,10,15, 19,23;91:4;93:24;94:9, 23;95:9,16;96:5;100:19, 23;101:10;129:6,12 seniors (1) 10:10 senior's (1) 95:13 sense (6) 10:12;12:11;23:22;	32:20;53:5;70:3 sensitive (1) 126:17 sentence (4) 107:3,23;109:19; 110:3 separate (1) 107:14 sequence (1) 45:12 serious (3) 23:20,21;28:20 seriously (1) 25:17 serve (4) 87:3;95:15;127:17; 128:12 served (2) 34:9;93:8 Service (2) 8:13;34:14 SESSION (7) 113:8 set (1) 71:7 setting (1) 86:24 several (7) 19:16;31:4,5;43:13; 46:18;67:8;129:14 severely (1) 47:10 shaky (1) 102:23 shape (1) 15:13 share (4) 12:12,13;28:12;98:12 Sherry (2) 15:3;16:8 shopping (1) 87:10 short (5) 48:23;49:15;54:17; 86:9;97:7 shortcomings (3) 6:13,16;127:24 show (7) 4:22;5:12;27:25; 42:21;64:18;65:20;92:7 showed (6) 64:2;93:2,15;94:3,4,6 showing (2) 92:16;93:23 shown (14) 14:10;19:10;20:19; 21:5;50:18,19;58:16; 91:22,24;92:4,13;94:16; 95:10;117:16 shows (1) 71:12 side (1) 115:6	sides (2) 116:24;117:4 side's (1) 21:21 significant (2) 18:12;43:16 signifies (2) 114:15,18 signify (1) 103:3 similar (8) 22:16;36:19;45:11; 46:14,16;52:7;66:20; 67:12 similarities (1) 47:15 similarity (2) 86:23;95:24 Similarly (1) 69:17 simple (1) 29:3 simply (2) 28:10;53:2 singular (1) 102:3 sit (2) 93:6;99:16 sitting (1) 100:3 situation (5) 25:9,10;47:17;86:16; 95:7 situations (4) 23:5;24:19;25:3;92:19 six (2) 58:2;109:22 size (3) 124:14;125:14;126:17 skip (1) 111:21 slant (3) 64:22;68:12,23 slants (1) 64:13 small (13) 30:21,23,24;31:4,13; 44:2,8,9;67:5,6;96:22; 129:24;130:3 Smart (91) 27:3;29:7,13,16,18,19; 32:19;38:10,10,11,15; 39:2,4,10,16;40:10,23; 41:24;45:15;46:7,7; 50:19;51:16,17;61:19, 23,24;62:3,5,9,10,14,15; 63:3,15;69:16,23;78:25; 79:4;80:5,14,18;81:9,13, 17,20,24;82:6,8,24;83:5, 9,18;84:2,5,8,12,12,16, 17,20,21,24,25;85:5,7,9, 10,20,21,24;86:2,4,5,8, 10;98:23;99:18;101:16,	21;103:12,19;104:21; 105:2,18;110:23,23; 120:7,7;121:18,18 social (3) 4:18;7:17;32:16 societies (1) 9:13 Society (3) 9:18,20,21 sodium (1) 77:14 sold (5) 84:13,17,21,25;85:2 somehow (2) 107:16;115:9 someone (6) 28:24;30:15,17;75:8; 81:2;98:11 someone's (1) 75:3 Sometime (1) 16:12 Sometimes (7) 17:16;24:13;25:12; 50:10;65:23;66:4;69:10 soon (1) 5:5 Sorry (14) 8:22;25:2;37:2;60:7; 69:2;78:9;80:12;83:17; 88:20;98:17;109:15; 110:24;120:22;131:24 sort (2) 50:11;52:5 sound (1) 19:2 sounds (3) 122:17,21;123:3 source (5) 19:13,19;20:20;62:4; 90:18 Southern (1) 15:23 speak (1) 14:21 speaking (2) 23:18;33:24 specializing (1) 4:18 specific (3) 111:11;112:19;120:12 specifically (2) 36:16;83:21 specifics (1) 95:6 speculate (1) 73:14 spelled (1) 6:11 spend (2) 26:8;123:4 spending (2) 43:18,19	spent (4) 43:20;122:14,24; 123:22 sponsored (1) 62:11 sponsorship (1) 20:4 Squirt (1) 100:15 stand (1) 107:17 standard (4) 30:8,10;42:2;56:10 standards (8) 5:19;6:14;9:25;14:19; 28:11;36:13,15;49:12 start (5) 24:22;50:6;52:2; 117:20;122:12 started (1) 25:5 starting (1) 19:2 starts (1) 109:16 State (4) 10:9;13:13;63:18; 86:14 stated (2) 7:2;87:17 statement (5) 52:24;72:20;111:23; 116:5;120:12 states (6) 65:13;66:17,20; 109:19;131:13,15 statistic (1) 125:14 statistical (1) 10:13 still (2) 26:15;59:7 stimulus (22) 19:15;20:19;21:5; 22:16,20;23:10;34:24, 24;49:22;50:4,9;52:9; 91:22;92:2,4,14,16,20; 93:3,4,5;94:16 stocks (1) 41:20 store (4) 47:13;85:6,11,17 stores (1) 84:18 Stouffer (4) 107:24;110:16; 116:17,22 Stouffers (12) 76:18;77:4,8,12,16,20, 24;78:5,10;79:11,17; 115:12 strength (2) 101:21;103:4
---	---	---	--	--

strike (1) 116:13	suffers (1) 42:7	87:13;91:18,21;92:3,15; 93:13,15,19;94:18,25; 97:2,15;99:18;100:4,15, 16,18;102:17;104:17; 108:10,19;109:20; 111:20;116:25;119:13, 22,24;124:11,14;125:3, 6,18;126:8,10,22;127:3; 129:7	8:10;9:25;33:16,17 Telephone (4) 51:8,21;126:8,10 ten (3) 47:24;122:24;123:6 tend (2) 33:25;86:20 tendency (1) 34:8 tending (1) 65:20 tends (2) 80:14;82:24 term (13) 20:16;65:3,7;69:4,7,8; 70:7;97:18,22;98:2; 102:2;105:2;112:9 terminology (3) 19:21;69:20;70:17 terms (2) 70:19,22 terrible (1) 38:5 test (10) 21:4;32:23;34:23,24; 35:2;44:8,16;50:11,16; 94:7 tested (1) 22:17 testified (14) 4:4;14:12;59:9,20; 60:10;64:4;76:2;83:4; 91:21;92:15;97:11;98:7; 101:3;129:4 testify (2) 83:7;94:14 testifying (3) 12:18;13:20;61:13 testimony (43) 4:24;10:20;14:9,13; 16:5;17:23;18:2,5; 30:21;35:10,12,16; 37:18,21;43:8,25;45:6; 46:25;47:4;48:6;49:18, 20,21;52:21;53:3;54:25; 55:3,7,11,15,17;56:7,23; 57:7;59:21,25;60:5,13, 20;88:5;105:17;123:5; 127:20 texts (1) 14:16 theory (1) 74:25 therefore (3) 100:11;110:8,11 thinking (3) 96:10;130:10;131:25 third (2) 48:18;49:4 though (1) 70:19 thought (14) 28:3;36:5;39:18;53:4,	13;78:3;81:19;96:3,12, 19;111:4;112:14;115:9; 128:5 thoughts (2) 12:11;73:10 thousand (3) 12:23,24;64:5 three (22) 13:3;14:21;26:21; 37:23,24;38:4,20,20; 40:24;45:3,10;46:16; 51:13;54:3;58:4,7;64:9; 69:12,17;109:12;112:6; 114:11 times (4) 12:3;20:11;22:4;90:17 title (1) 4:13 today (10) 13:17;14:7;15:21; 99:16;100:3;123:5,19, 22,24,25 today's (1) 123:19 told (4) 11:11;55:13;91:25; 108:21 took (1) 9:3 top (1) 107:2 topics (3) 9:24;14:14;21:13 total (2) 66:15;123:9 totally (4) 57:10,14;130:13,25 towards (2) 35:15;102:7 trade (5) 20:24;40:22;42:10; 50:13;84:14 trademark (18) 6:22;14:5;20:24;21:9; 42:10;50:13;59:17; 60:18,24;61:24;65:4; 86:18;99:3,15;101:6; 121:25;122:3;129:10 trademarks (2) 15:5;101:4 traditional (3) 11:21;48:16;90:20 train (3) 96:3,12,19 training (1) 7:7 trans (3) 81:18;82:11,18 treat (1) 31:9 treatise (1) 101:9 treatises (1)
strive (1) 86:20	suggest (2) 68:13,24	surveyed (5) 63:9,13;88:25;124:15; 125:20 surveying (2) 33:16;89:3 surveys (35) 6:15;10:11;12:20; 13:5,24;14:4;18:17; 21:11;23:14,17;30:6; 33:17,20,22;56:2;64:5,9; 86:14;87:20;93:2;95:9; 97:12;98:8;100:14; 101:5;103:25;104:5,8, 12,21,25;118:12,13,24; 124:6 suspicion (1) 44:19 Swanson (1) 76:15 switched (1) 21:13 sworn (1) 4:2 systematically (1) 29:25		
strong (10) 100:20;101:10,17,24; 102:2,10,12;103:4,8,11	suggestion (1) 26:7		T	
struck (1) 56:6	suggestive (1) 52:17			
structured (1) 51:15	suggests (2) 80:24;83:24			
stuck (1) 130:16	suitable (1) 22:10			
student (1) 19:3	summarize (2) 18:10;19:4			
studied (2) 64:23;65:15	summary (2) 6:12;15:12			
studies (20) 7:15;9:6;11:15,18,22; 12:8;13:10;29:11;33:25; 45:21;48:17;91:9;98:8, 15,19;101:20;105:21; 110:4;115:21;121:3	summer (3) 8:13,17,18			
study (64) 5:16;6:13,17;12:12, 16;13:17;15:25;17:5; 23:21;24:8,13,17,21; 25:13,23;26:4,7;34:23; 36:12,17;38:12,17; 40:21;44:6,14,24;45:8; 48:21;56:25;57:5,17; 58:15;63:13;66:23;69:5, 19;70:8;72:4;73:4,7; 74:4,7;88:8;89:10,12; 92:6;97:16;98:11;107:5, 11;108:23;110:10,15,20; 111:2,6;115:13;116:21; 119:4;120:4;121:14; 127:23;128:7;131:4	supermarket (10) 27:2,14;39:2;41:19; 53:12,21;54:15;75:19; 79:9;122:8 supervise (1) 11:15 supervision (1) 104:14 supervisors (1) 49:6 Supplement (2) 114:8,12 supplemental (1) 128:15 support (6) 4:20;11:25;12:9;68:9; 99:8,12 supported (1) 17:7 supposed (4) 34:15;36:21;57:9,11 Sure (11) 8:11;14:12;49:3,7; 68:18;89:2;90:5;101:13; 114:15;127:2;131:21 surprise (1) 108:21 survey (128) 4:17;5:2,9,20;6:7,20; 8:9;9:24;11:21;12:4,22; 13:2,15;14:13,18,24; 15:9,18;17:10;18:4,13, 22;21:17,21,23;22:3,7, 10,11;23:6,8;24:21;25:5, 11;28:11;31:21,23; 33:14;35:4,14,19;36:5; 37:6,9,22;42:15,19,20; 47:2;49:12;51:4,5,11; 52:5,8;55:9,14,16;56:22; 57:8,21,22;58:8,18;59:9, 13;61:19;62:20;64:12, 13,14,17,23;65:4,19; 66:10;67:3;68:4,13,24; 69:5;70:8;73:4,7,11,20, 22,24;79:24;86:16,18;			
studying (2) 67:13;89:15		talk (1) 24:12 talked (4) 21:14;79:6;121:8; 126:16 talking (11) 71:4;72:19;73:17; 81:12;120:10,14;121:4, 23,24;122:2;125:5 talks (1) 116:6 tap (1) 19:18 target (4) 19:8;29:14;79:4;89:12 task (1) 96:9 taste (1) 130:5 taught (2) 9:23;10:2 tea (1) 44:12 teaching (1) 10:6 techniques (4)		
stuff (8) 11:23;17:22;20:4; 41:13;46:4;82:16;101:2; 131:3				
stupid (2) 33:2;41:6				
subgroups (1) 9:17				
subject (4) 40:7;61:2;83:15; 131:25				
subsequent (6) 70:12,13;94:12;95:17; 123:25;128:3				
substantiate (1) 100:10				
substantiation (1) 56:18				
substantive (4) 49:23;52:9;71:20,25				
subtract (1) 21:3				

56:20 trial (8) 4:24;11:2;14:5;54:24; 25;55:11;59:18;129:10 tribunal (1) 59:17 tried (4) 56:16;109:23;110:7; 115:16 Tropicana (5) 15:22;16:2,25;17:3; 21:14 Tropicana's (1) 17:8 true (4) 41:10;105:10;108:7; 126:7 truth (2) 29:2;115:17 try (9) 24:20,20;32:11;47:14; 17;49:2;87:6,8;95:22 trying (17) 11:2,4;32:11;44:25; 71:19,24;72:10;78:13; 22;79:14,20;96:14; 98:19;111:21;119:16; 121:2;130:21 TTAB (1) 14:6 turn (2) 37:24;109:14 turned (2) 39:21;50:11 twenty (1) 123:6 twice (1) 98:11 two (15) 15:7;27:5;33:23;38:7; 14,19;50:24;52:13; 57:25;63:6;70:16;96:24; 98:16;114:3;121:2 type (7) 25:11;78:12,21;79:13; 18;120:14;122:3 types (3) 46:17;96:13;98:14 typical (6) 22:5,6;23:6,9;25:11; 30:9 typically (12) 12:16;19:14;22:8; 29:12;30:5,15;32:18; 49:15;71:9;89:12;92:15; 95:14 typing (1) 114:18	Ultimately (1) 98:18 unaware (4) 61:23;62:3,9,14 uncertain (1) 115:4 under (15) 19:25;21:6;29:23; 30:3;38:17;65:23;82:6; 24;104:14;107:11; 108:11;111:5;116:7; 126:25;127:4 understands (1) 40:6 undesirable (1) 90:22 unfair (1) 15:6 Unfortunately (1) 131:18 unheard (1) 127:4 uniformly (1) 36:14 uninterpretable (1) 42:12 Union (1) 18:23 unique (2) 129:21,21 unit (1) 27:23 United (2) 131:12,15 universe (68) 19:8,9;21:8;23:25; 25:16,19;26:18,22,23; 27:8;28:14;29:5,12,24; 30:20,24;64:23;65:4,8,9, 10,12,18,22,24;66:10,17, 19,22;67:5,7,11,23;74:8, 11,13,16;76:3,5;79:24; 91:17;102:24;107:10; 108:11,23;109:19;110:5, 11,15,21;115:8,15,19,22, 24;116:6,9,25;117:5,13; 119:9,13,18;120:6; 121:3,16;122:6;124:13 University (3) 7:18,20;10:5 unknowable (1) 125:22 unless (3) 25:18;43:5;61:5 unlikely (1) 27:24 unreasonable (2) 13:12;54:7 up (19) 5:25;10:16,18;11:6; 12:16;16:21;21:7;26:8; 27:25;31:3;75:8;86:24; 87:6;96:18;112:23;	122:13;125:16;126:23; 129:18 upon (3) 66:24;94:16;119:14 upper (1) 109:15 upwards (1) 126:23 use (13) 20:6,6;51:22;57:12; 61:24;69:20;70:17,20; 74:7;91:13;92:11;106:2; 120:11 used (16) 13:7;14:4;15:18; 18:17;28:14,23;42:19; 69:8;70:23;86:14;99:7, 12;100:8,9,11;121:12 useful (9) 27:11,21;32:10;43:23; 88:23;89:2,16,19,20 useless (1) 24:16 user (7) 19:7;29:13;75:13,23; 90:22,23;93:25 users (4) 74:15;89:12,15,17 user's (28) 19:11;29:6,14;76:4; 79:25;89:4,5,22;90:2,7, 10,15,19;91:5;94:4,7,9, 23;95:9,14,17,18;96:5,7; 121:5,7;129:6,13 uses (1) 69:18 using (3) 22:10;52:18;69:11 USPQ (8) 111:11;112:20;113:2, 21;114:6,13,16,20 usual (1) 98:12 usually (8) 30:21;32:10,17;44:2; 56:17;74:5;96:9;124:20	45:20;126:2 varied (1) 124:11 varieties (1) 76:9 various (1) 15:14 vary (2) 126:13,15 vegetables (1) 84:10 venture (1) 70:15 verify (1) 108:6 versa (1) 86:10 version (3) 38:21;111:11;112:21 versus (3) 34:4;60:6,8 vice (2) 9:5;86:10 view (5) 19:15;45:9;47:7; 49:22;95:14 vineyards (2) 130:12,12 virtue (1) 30:12 vis-a-vis (1) 48:14 visual (1) 96:25 vitamins (2) 81:25;82:15	ways (1) 23:16 weak (1) 22:13 week (1) 54:3 weight (24) 78:13,22;81:3,7; 83:23;107:6,14,17,19, 24;108:9,18,19,20,22; 109:20,23;110:7,15,16; 115:10,13;116:14; 119:16 Weillbacher (4) 110:4;111:2;115:13; 119:13 Weillbacher's (1) 119:4 weren't (1) 54:6 West (1) 112:21 western (1) 131:14 Wharton (3) 7:22;8:5,6 whatsoever (1) 56:18 whereas (1) 114:7 Whereupon (6) 58:25;80:10;109:6; 113:12;118:20;120:23 wherever (1) 85:2 whole (5) 69:19;77:18;84:9; 117:20;127:24 wide (1) 98:6 widely (3) 100:20;101:11;103:13 wish (1) 132:2 withdraw (1) 112:3 withdrawing (1) 117:24 within (1) 114:4 without (2) 22:21;96:6 WITNESS (4) 61:7;93:8;112:3;132:6 women (1) 109:21 wonderful (1) 15:11 word (1) 110:6 wording (2) 25:20;27:13 words (4)
U		V	W	
ultimate (3) 68:9;95:11;96:16		valid (1) 32:14 validate (2) 48:21,22 validation (9) 47:22,25;48:5,6,10,10, 15,16;49:10 validity (2) 58:5,7 valuable (1) 6:21 value (4) 6:17;55:19;66:9;67:2 variations (2)	waiting (1) 131:2 Washington (1) 7:21 wasteful (1) 117:23 Watchers (13) 83:23;107:6,14,17,19, 24;108:9,19,20;110:16; 115:10,14;116:15 Watchers' (3) 108:22;109:20;110:15 way (46) 17:15;23:11;25:17; 31:22,25;32:2,24;33:5; 34:8;38:24;39:4,10; 40:4,16;41:2,25;45:24; 46:6,14,19;49:15;50:5; 51:15;52:7,15;55:16,24; 57:11;64:14,22,23; 67:23;68:12,23;69:9; 72:10;78:4;87:4;91:16; 102:12;125:16;130:17; 131:7,8,17,19	

50:25;63:12;68:8;
110:14
work (22)
4:10;8:7;11:10,13;
12:2,6;13:6,15;31:6;
36:19;56:11;71:19,24;
72:10,18;102:22;106:16,
16;115:11;122:9;
123:10;124:23
worked (4)
8:11,24;9:2;115:10
world (1)
96:20
worth (2)
43:18,19
worthless (3)
26:10;42:13;43:20
written (6)
35:8;37:20;45:20;
47:21;54:24;57:14
wrong (5)
44:20;74:2;99:19;
100:5,12
wrote (2)
49:17;54:23

Y

year (3)
109:24;122:13;130:25
years (2)
9:3;10:6
yields (1)
6:21
York (2)
7:14;15:23

Westlaw.

Page 1

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

▷

United States District Court,
S.D. New York.

WEIGHT WATCHERS INTERNATIONAL, INC.,
Plaintiff,

v.

The STOUFFER CORPORATION, Stouffer Foods
Corporation and Nestle Enterprises, Defendants.
STOUFFER FOODS CORPORATION, Counter-
claim-Plaintiff,

v.

WEIGHT WATCHERS INTERNATIONAL, INC.,
H.J. Heinz Company and Foodways National, Inc.,
Counterclaim-Defendants.

No. 88 Civ. 7062 (MBM).

Aug. 30, 1990.

As Amended Oct. 12, 1990.

Manufacturer of Weight Watchers diet food products sued manufacturer of Lean Cuisine low calorie frozen foods in regard to defendant's advertisements which listed products which were said to be Weight Watchers exchanges that would enable Weight Watchers adherents to use defendant's entrees in their Weight Watchers diets. Plaintiff alleged trademark infringement, false advertising and unfair competition in violation of the Lanham Act, and state law claims of unfair competition, dilution, and deceptive trade practices. The District Court, Mukasey, J., held that: (1) two of defendant's advertisements infringed the Weight Watchers trademark by creating confusion as to the source and endorsement of the product, but defendant's later advertisement did not infringe the Weight Watchers trademark; (2) evidence did not support plaintiff's claim that defendant's statement that Lean Cuisine meals "fit into" the Weight Watchers program constituted false advertising; and (3) plaintiff was entitled to injunctive relief with respect to the infringing advertisements.

So ordered.

West Headnotes

[1] Antitrust and Trade Regulation 29T ⚡65

29T Antitrust and Trade Regulation

29TII Unfair Competition

29TII(B) Actions and Proceedings

29Tk65 k. Persons Liable. Most Cited

Cases

(Formerly 382k584.1, 382k584 Trade Regulation)

Trademarks 382T ⚡1565

382T Trademarks

382TIX Actions and Proceedings

382TIX(A) In General

382Tk1564 Persons Liable

382Tk1565 k. In General. Most Cited

Cases

(Formerly 382k584 Trade Regulation)

In action for, inter alia, trademark infringement and false advertising arising out of defendant corporation's advertising campaign, there was no evidence that chairman of corporation which owned defendant corporation approved advertisement at issue, and there was no other evidence of other connections between parent corporation and case; thus, plaintiff's claims against parent corporation were dismissed.

[2] Trademarks 382T ⚡1565

382T Trademarks

382TIX Actions and Proceedings

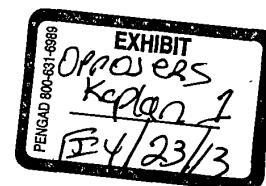
382TIX(A) In General

382Tk1564 Persons Liable

382Tk1565 k. In General. Most Cited

Cases

(Formerly 382k584.1, 382k584 Trade Regulation)



Evidence showed that owner of trademark "Lean Cuisine" had knowledge that marketer of Weight Watchers diet program was displeased with Lean Cuisine's manufacturer's use of Weight Watchers exchange information in Lean Cuisine ads prior to time that ads were published; thus, owner of "Lean Cuisine" trademark was not dismissed in Weight Watchers' subsequent action for, inter alia, trademark infringement, arising out of that ad campaign.

[3] Trademarks 382T 1523(1)

382T Trademarks

382TVIII Violations of Rights

382TVIII(D) Defenses, Excuses, and Justifications

382Tk1521 Justified or Permissible Uses

382Tk1523 Identification or Description

382Tk1523(1) k. In General. Most

Cited Cases

(Formerly 382k338 Trade Regulation)

Under Lanham Trade-Mark Act, competitor may use another's trademark when providing information about substitutability of products because by doing so supplier engages in fair competition based on those aspects—for example, price—in which products differed. Lanham Trade-Mark Act, §§ 43, 43(a), as amended, 15 U.S.C.A. §§ 1125, 1125(a).

[4] Trademarks 382T 1619

382T Trademarks

382TIX Actions and Proceedings

382TIX(C) Evidence

382Tk1613 Admissibility

382Tk1619 k. Consumer Data and Market Research; Tests and Surveys. Most Cited Cases

(Formerly 382k580 Trade Regulation)

In determining whether alleged trade infringement caused actual confusion, criteria for trustwor-

thiness of survey evidence are that "universe" was properly defined, representative sample of that universe was selected, questions to be asked of interviewees were framed in clear, precise and nonleading manner, sound interview procedures were followed by competent interviewers who had no knowledge of litigation or purpose for which survey was conducted, data gathered was actually reported, data was analyzed in accordance with accepted statistical principles, and objectivity of entire process was assured.

[5] Trademarks 382T 1629(4)

382T Trademarks

382TIX Actions and Proceedings

382TIX(C) Evidence

382Tk1620 Weight and Sufficiency

382Tk1629 Similarity; Likelihood of Confusion

382Tk1629(4) k. Consumer Data and Market Research; Tests and Surveys. Most Cited Cases

(Formerly 382k596 Trade Regulation)

As to issue of whether actual confusion of source of products resulted from "Lean Cuisine" advertisements stating that Lean Cuisine frozen diet entrees fit into or were interchangeable with Weight Watchers diet programs or exchanges, consumer survey conducted by Weight Watchers was entitled to only slight weight, and survey by manufacturers of Lean Cuisine was entitled to no weight; neither survey's universe focused upon people who ate diet or low-calorie frozen foods or even people who were trying to lose weight through dieting, and Lean Cuisine's method assumed that existence of confusion in other ads set constant permissible level of confusion which ad mentioning more than one product must exceed in order to be actionable.

[6] Trademarks 382T 1113

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

382Tk1113 k. Accompaniments Mitigating Confusion; Disclaimers. Most Cited Cases
(Formerly 382k375.1, 382k375 Trade Regulation)

Disclaimer in minuscule print on very bottom of trade infringement defendant's advertisement did not effectively eliminate misleading impression conveyed in advertisement that defendant's frozen diet entrees were affiliated with plaintiff's diet program.

[7] Trademarks 382T 1106

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1106 k. Relationship Between Parties or Actors Using Marks. Most Cited Cases
(Formerly 382k354 Trade Regulation)

Word "presents" in between marks "Stouffer's" and "Weight Watchers," in advertisement stating "Stouffer's presents Weight Watchers exchanges for all 28 Stouffer's Lean Cuisine entrees," created impression that either Stouffer owned Weight Watchers, or more likely that Stouffer was presenting those exchanges for Weight Watchers, i.e., that Weight Watchers gave Stouffer exchanges to publish in ad; thus, for purposes of Weight Watchers' action against Stouffer's for, inter alia, trade infringement, ad was ambiguous on its face and threatened strong likelihood of consumer confusion.

[8] Trademarks 382T 1113

382T Trademarks

382TIII Similarity Between Marks; Likelihood of Confusion

382Tk1113 k. Accompaniments Mitigating Confusion; Disclaimers. Most Cited Cases
(Formerly 382k423.1, 382k423 Trade Regulation)

Where trade infringement defendant's advertisement was ambiguous on its face and threatened

strong likelihood of consumer confusion, disclaimer printed in small type, which appeared below dotted line that suggested where consumer should cut out advertisement if they wished to use it for reference, could not eliminate confusion created by misleading advertisement.

[9] Trademarks 382T 1523(1)

382T Trademarks

382TVIII Violations of Rights

382TVIII(D) Defenses, Excuses, and Justifications

382Tk1521 Justified or Permissible Uses

382Tk1523 Identification or Description

382Tk1523(1) k. In General. Most Cited Cases
(Formerly 382k354 Trade Regulation)

Stouffer Foods' 1987 and 1988 advertisements for its Lean Cuisine infringed Weight Watchers trademark by creating confusion as to source and endorsement of product; however, Stouffer Foods' 1989 advertisement did not infringe trademark merely because it used mark to point out Lean Cuisine's suitability for Weight Watchers program, as finding of infringement as to that advertisement would unduly discourage companies from advertising their products' compatibility with other companies' services or products. Lanham Trade-Mark Act, § 1 et seq., as amended, 15 U.S.C.A. § 1051 et seq.

[10] Antitrust and Trade Regulation 29T 27

29T Antitrust and Trade Regulation

29TII Unfair Competition

29TII(A) In General

29Tk25 Representations Concerning Others or Their Products; Disparagement

29Tk27 k. Particular Cases. Most Cited Cases
(Formerly 382k423.1, 382k423 Trade Regulation)

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

Statement that Stouffer Foods' Lean Cuisine entrees "fit" into Weight Watchers' program was not false, and thus, did not constitute false advertising under Lanham Act; despite possible minor discrepancies between way Weight Watchers and Stouffer would count food exchanges of given frozen meals, those differences did not materially affect ability of consumers to fit Lean Cuisine into their Weight Watchers' program, and adherence to Weight Watchers food plan necessarily involved certain levels of approximation. Lanham Trade-Mark Act, § 43, as amended, 15 U.S.C.A. § 1125.

[11] Antitrust and Trade Regulation 29T 27

29T Antitrust and Trade Regulation

29TII Unfair Competition

29TII(A) In General

29Tk25 Representations Concerning Others or Their Products; Disparagement

29Tk27 k. Particular Cases. Most

Cited Cases

(Formerly 382k423.1, 382k423 Trade Regulation)

For purposes of Lanham Act false advertising claim by manufacturer of Weight Watchers food products against manufacturer of Lean Cuisine frozen entrees in connection with advertisement which allegedly implied that Lean Cuisine products fit into or were interchangeable with Weight Watchers' diet program or exchanges, manufacturer of Lean Cuisine was required to include optional calories listing when optional calories foods, i.e., foods that do not fall under exchange except optional calories, were used; otherwise, exchange information would seem deceptively more attractive to Weight Watchers members who did not wish to use up their optional calorie quota. Lanham Trade-Mark Act, § 43, as amended, 15 U.S.C.A. § 1125.

[12] Antitrust and Trade Regulation 29T 27

29T Antitrust and Trade Regulation

29TII Unfair Competition

29TII(A) In General

29Tk25 Representations Concerning Others or Their Products; Disparagement

29Tk27 k. Particular Cases. Most

Cited Cases

(Formerly 382k423.1, 382k423 Trade Regulation)

Even if Lean Cuisine advertisement created false implication, when combined with Lean Cuisine boxes, that Weight Watchers exchanges given in ad were identical to exchanges listed on Lean Cuisine boxes, when in fact exchanges listed on boxes were based upon exchange system used by American Diabetes Association and American Dietetic Association (ADA), and even if ADA exchanges and Weight Watchers exchanges were different, that misleading implication did not provide cause of action for false advertising under Lanham Act; because advertisement was implicitly rather than explicitly false, Weight Watchers was required to present evidence that public was misled, and Weight Watchers presented no evidence that consumers used exchange information on Lean Cuisine packages as part of their Weight Watchers program because they were misled by ads into thinking that exchange information on packages would fit into their Weight Watchers diet. Lanham Trade-Mark Act, § 43, as amended, 15 U.S.C.A. § 1125.

[13] Antitrust and Trade Regulation 29T 29

29T Antitrust and Trade Regulation

29TII Unfair Competition

29TII(A) In General

29Tk29 k. Origin, Representations Concerning. Most Cited Cases

(Formerly 382k588 Trade Regulation)

Antitrust and Trade Regulation 29T 30

29T Antitrust and Trade Regulation

29TII Unfair Competition

29TII(A) In General

29Tk30 k. Sponsorship, Approval, or Connection, Representations Concerning. Most Cited Cases

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

(Formerly 382k588 Trade Regulation)

Manufacturer of Weight Watchers diet products failed to show that advertisement stating "Stouffer's presents exchanges for all 36 Lean Cuisine items to fit into your Weight Watchers program" would confuse consumers as to source of Stouffer's Lean Cuisine products or sponsorship of those products, and thus, Weight Watchers presented insufficient proof to support its unfair competition claim under New York common law.

[14] Trademarks 382T 1461

382T Trademarks

382TVIII Violations of Rights

382TVIII(B) Dilution

382Tk1461 k. Nature and Extent of Harm; Similarity, Competition, and Confusion. Most Cited Cases

(Formerly 382k462 Trade Regulation)

New York's antidilution statute does not extend to cases where defendant is direct competitor selling similar products. N.Y.McKinney's General Business Law § 368-d.

[15] Antitrust and Trade Regulation 29T 165

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(B) Particular Practices

29Tk165 k. Representations Concerning Others or Their Products; Disparagement. Most Cited Cases

(Formerly 382k864 Trade Regulation)

Even though manufacturer of Weight Watchers diet products proved that exchanges given for some of Stouffer Foods' Lean Cuisine entrees in Stouffer advertisements were not accurate, Weight Watchers did not prove its claim against Stouffer under New York consumer protection statute; Weight Watchers failed to show either that it was damaged by those ads, or that Stouffers profited from ads.

N.Y.McKinney's General Business Law § 349(h).

[16] Antitrust and Trade Regulation 29T 23

29T Antitrust and Trade Regulation

29TII Unfair Competition

29TII(A) In General

29Tk21 Advertising, Marketing, and Promotion

29Tk23 k. Particular Cases. Most

Cited Cases

(Formerly 382k423.1, 382k423 Trade Regulation)

Statement on Weight Watchers brand frozen entree packages that "[t]his product was prepared to fit Weight Watchers Program and is useful for weight control when used strictly in accordance with Weight Watchers food plan" did not constitute false advertising, even if exchange information on packages was not necessarily accurate; statement was benign, and Weight Watchers could not be precluded from making statement in view of finding that even competitor's product could "fit into" Weight Watchers program. Lanham Trade-Mark Act, § 43(a), as amended, 15 U.S.C.A. § 1125(a).

[17] Antitrust and Trade Regulation 29T 48

29T Antitrust and Trade Regulation

29TII Unfair Competition

29TII(A) In General

29Tk48 k. Assertion of Rights. Most Cited Cases

(Formerly 382k423.1, 382k423 Trade Regulation)

Letter sent by Weight Watchers to franchisees and members alerting them to Lean Cuisine advertisements, which letter stated that Weight Watchers did not stand behind information statement on any brand of food except its own, but that it did not dispute or confirm accuracy of any statement by any other manufacturer, did not constitute unfair competition under Lanham Act or New York or Ohio law; manufacturer of Lean Cuisine presented no

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

evidence that consumers interpreted statement as implying that only Weight Watchers exchanges were correct. N.Y.McKinney's General Business Law § 349; Lanham Trade-Mark Act, § 43(a), as amended, 15 U.S.C.A. § 1125(a).

[18] Antitrust and Trade Regulation 29T 54

29T Antitrust and Trade Regulation

29TII Unfair Competition

29TII(A) In General

29Tk54 k. Miscellaneous Particular Practices. Most Cited Cases

(Formerly 382k411 Trade Regulation)

Diet product manufacturer's rejection for its magazine of competitor's advertisements did not constitute unfair competition; competitor's sales figures demonstrated that magazine was not essential to its ability to compete. Lanham Trade-Mark Act, § 1 et seq., as amended, 15 U.S.C.A. § 1051 et seq.; N.Y.McKinney's General Business Law §§ 349, 349(h).

[19] Trademarks 382T 1534

382T Trademarks

382TVIII Violations of Rights

382TVIII(D) Defenses, Excuses, and Justifications

382Tk1533 Delay in Assertion of Rights; Laches

382Tk1534 k. In General. Most Cited Cases

(Formerly 382k385.1, 382k385 Trade Regulation)

Trademarks 382T 1537

382T Trademarks

382TVIII Violations of Rights

382TVIII(D) Defenses, Excuses, and Justifications

382Tk1533 Delay in Assertion of Rights; Laches

382Tk1537 k. Prejudice from Delay. Most Cited Cases

(Formerly 382k385.1, 382k385 Trade Regulation)

Fact that defendant manufacturer of frozen diet entrees continued to spend money on advertising which exploited plaintiff's trademark after plaintiff discovered such advertising was not prejudicial reliance, and defendant offered no evidence that it was harmed more than it was helped by plaintiff's insignificant delay in bringing action for, inter alia, trade infringement; thus, defendant could not prevail on its laches defense.

[20] Trademarks 382T 1663

382T Trademarks

382TIX Actions and Proceedings

382TIX(D) Damages and Profits

382Tk1661 Profits; Accounting

382Tk1663 k. Confusion or Deception.

Most Cited Cases

(Formerly 382k673 Trade Regulation)

Trademarks 382T 1664

382T Trademarks

382TIX Actions and Proceedings

382TIX(D) Damages and Profits

382Tk1661 Profits; Accounting

382Tk1664 k. Intent; Fraud. Most Cited Cases

(Formerly 382k673 Trade Regulation)

Trademarks 382T 1717(2)

382T Trademarks

382TIX Actions and Proceedings

382TIX(F) Injunctions

382Tk1712 Permanent Injunctions

382Tk1717 Scope and Extent of Relief

382Tk1717(2) k. Infringement in General. Most Cited Cases

(Formerly 382k645 Trade Regulation)

Under Lanham Act, defendant was enjoined from publishing two infringing advertisements for its frozen diet entrees, but was not liable for ac-

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

counting payment of its profits from infringing acts; plaintiff did not present evidence that it sustained damages from publication of infringing ads, as its survey evidence of actual consumer confusion was substantially flawed, defendants did not deliberately violate law when they published ads, and plaintiff did not show that consumers bought defendant's entrees solely because they were misled by ads into thinking that plaintiff endorsed those food items. Lanham Trade-Mark Act, § 35(a), as amended, 15 U.S.C.A. § 1117.

Trademarks 382T 1800

382T Trademarks

382TXI Trademarks and Trade Names Adjudicated

382Tk1800 k. Alphabetical Listing. Most Cited Cases

(Formerly 382k736 Trade Regulation)

Lean Cuisine.

Trademarks 382T 1800

382T Trademarks

382TXI Trademarks and Trade Names Adjudicated

382Tk1800 k. Alphabetical Listing. Most Cited Cases

(Formerly 382k736 Trade Regulation)

Weight Watchers.

***1262** William R. Hansen, Bert A. Collison, Ronald J. McGaw, Nims, Howes, Collison & Isner, New York City, Robert J. Hollweg, Weight Watchers Intern., Inc., Jericho, N.Y., for plaintiff/counterclaim-defendants.

Robert V. Vickers, Body Vickers & Daniels, Cleveland, Ohio, Mary Lee Pilla, Nestle Enterprises, Inc., Solon, Ohio, Paul Fields, Ira J. Levy, Darby & Darby, New York City, for defendants/counterclaim-plaintiff.

OPINION AND ORDER

MUKASEY, District Judge.

Whether or not the late Duchess of Windsor was right when she postulated that one can never be too rich or too thin,^{FN1} one certainly can get rich these days by holding out the promise to make others thin. The parties to this action hold out that promise, and clash in pursuit of those riches.

FN1. See Rose, *Fasting Girls: The Emergence of Anorexia Nervosa as a Modern Disease*; Book Review, *The Atlantic*, July, 1988; Laderman, *Wall Street's Newest Problem: Too Much Money*, *Business Week*, Aug. 1, 1988, at 80.

Plaintiff Weight Watchers International, Inc. markets both a diet program and a line of frozen low calorie foods. Plaintiff's diet program, as set forth in greater detail below, employs a system of six food groups (bread, fruit, protein, fat, milk and vegetable) in specified quantities, called exchanges. Defendant Stouffer Foods Corporation manufactures and markets a line of low calorie frozen foods under the name "Lean Cuisine." Beginning in 1987, Stouffer launched an advertising campaign aimed primarily at those who follow the Weight Watchers program. The ads listed what were said to be Weight Watchers exchanges for Stouffer's Lean Cuisine entrees that would enable Weight Watchers adherents to use Lean Cuisine entrees in their Weight Watchers diets. In communications to those who followed its diet program, Weight Watchers disputed the accuracy of the Lean Cuisine ad campaign. This lawsuit followed, with Weight Watchers asserting trademark infringement and both sides leveling charges of deception and unfair trade practices.

Because the Stouffer ads in question were misleading or inaccurate in certain limited respects, they are enjoined for the ***1263** reasons and to the extent described below, although Stouffer certainly will be able to use the Weight Watchers name in accurate, non-confusing compatibility advertising. The Stouffer claims against Weight Watchers are

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

without substance and are dismissed.

Weight Watchers filed this suit in October, 1988 against The Stouffer Corporation, and later amended the complaint to include as defendants Nestle Enterprises, Inc. and Stouffer Foods Corporation. Plaintiff alleges trademark infringement, false advertising and unfair competition in violation of the Lanham Act, and state law claims of unfair competition, dilution and deceptive trade practices arising out of an advertising campaign for Stouffer Food Corporation's Lean Cuisine line of frozen entrees, including ads in 1987, 1988 and 1989. Plaintiff seeks an injunction prohibiting defendants from using the mark "Weight Watchers" in connection with any diet-related exchange information, or from stating or implying that defendants' products fit into or are interchangeable with plaintiff's diet program or exchanges. Plaintiff seeks the profits defendants earned from the advertising at issue as well as costs of suit.

Defendant Stouffer Foods Corporation filed counterclaims against Weight Watchers, H.J. Heinz Company and Foodways National, Inc., alleging deceptive and unfair trade practices and false advertising in violation of the Lanham Act, as well as state law claims of unfair competition, intentional interference with sale and injurious falsehood. Counterclaim-plaintiff asks for compensatory and punitive damages against counterclaim-defendants, as well as declaratory relief and costs.

From February 26, 1990 to March 7, 1990 the parties tried the case to the court. This opinion contains the findings and conclusions from the evidence at that trial.

I.

A. The Parties

Weight Watchers International is a corporation organized under the laws of Virginia, with its principal place of business in Jericho, New York. (Compl. ¶ 2) Weight Watchers was founded in 1963 by Jean Nidetch, a woman who resolved to lose weight but was unable to do so until she discovered

that group support for her weight loss efforts provided the needed catalyst for shedding pounds. She met with a group of overweight friends in her living room in Little Neck, Long Island, and they were so successful at losing weight that soon Nidetch was leading groups in her neighborhood. The groups became a business, and over the next 15 years the business expanded across the globe; by 1978, Weight Watchers had franchises all over the world and 500,000 members per week attending meetings world-wide. (Tr. 31-32)

In 1978, the H.J. Heinz Co. bought Weight Watchers (Tr. 32); four months earlier, Heinz had acquired Foodways National, Inc., a licensee of Weight Watchers which produced frozen foods under the Weight Watchers brand name. (Tr. 56-60) Weight Watchers receives a licensing fee from the sale of Weight Watchers brand frozen food based upon a percentage of sales. (Tr. 97) Foodways is not the only Weight Watchers licensee; other companies—particularly Heinz USA, another subsidiary of H.J. Heinz Co.—produce Weight Watchers brand products such as yogurt, salad dressing, condiments and mixes. (Tr. 104)

Sales of Weight Watchers brand frozen entrees manufactured by Foodways rose from \$90 million in fiscal 1982 to over \$300 million in fiscal 1989. (PX 66) Also by 1989, sales of the Weight Watchers diet program topped \$230 million (Tr. 33), with membership averaging over 600,000 people per week in the United States. (Tr. 33)

Weight Watchers International, H.J. Heinz Co. and Foodways National are all counterclaim-defendants in this case.

Named defendants The Stouffer Corporation (TSC) and Nestle Enterprises, Inc. (NEI) are Ohio corporations with their principal places of business in Solon, Ohio. Defendant and counterclaimant-plaintiff Stouffer Foods Corporation is a Pennsylvania*1264 corporation with its principal place of business in Solon, Ohio. TSC owns the registered trademarks "Lean Cuisine" and

"Stouffer's." (Tr. 1357)

Stouffer Foods has manufactured and marketed food products since 1946, but it did not introduce the line of frozen entrees at issue here, called Lean Cuisine, until 1981. (PX 66, Tr. 371) By 1982, Lean Cuisine surpassed Weight Watchers frozen entrees in total sales, and by 1983 was selling over twice the volume of the Weight Watchers brand. (PX 66) According to a chart introduced by Weight Watchers, Lean Cuisine's sales started dropping in 1985, and in 1988 were even with Weight Watchers' sales. (PX 66) Since then, Weight Watchers and Stouffer have been competing closely and ferociously for market share.

[1] Defendants assert that this court lacks personal jurisdiction over TSC and NEI. (Answer ¶¶ 53-57) Plaintiff tries to connect NEI with this case on the basis of Nestle Enterprises' ownership of Stouffer and Stouffer Food Corporation, and the alleged involvement of Nestle Chairman James Biggar in approving the Stouffer Foods Corporation advertisement at issue. Because there is no clear legally cognizable evidence that Biggar approved any of the ads at issue, and there is no other evidence of other connections between NEI and this case, plaintiff's claims against Nestle Enterprises are dismissed.

[2] The Stouffer Corporation is more closely tied with Stouffer Foods Corporation, and there is clear evidence that by the middle of 1988, management at TSC knew about Weight Watchers' displeasure with the ads at issue and Weight Watchers' objections to the use of exchange information in these ads, and that they negotiated this dispute with Weight Watchers management. (Tr. 1186) In letters to Weight Watchers' Director of Legal Affairs, TSC's Senior Vice President and General Counsel and Secretary, James Ball, described the history of the Lean Cuisine ad campaign targeted toward Weight Watchers members, discussed exchange information, showed an in-depth knowledge of the ads at issue here, and pointed out Weight Watchers' own shortcomings. (PX 64A, 64B) These letters

were written well before the 1989 advertisement was published, and thus indicate that TSC at the very least knew about the advertisements and probably was directly involved in the publishing of such ads. Therefore, The Stouffer Corporation is not dismissed as a defendant in this lawsuit.

B. *The Weight Watchers Program*

The Weight Watchers weight loss program has four parts: the food plan, the exercise plan, the self-discovery plan and group support. (Tr. 194) The self-discovery plan teaches members to recognize the situations which trigger overeating and to modify their behavior; group support, as the name suggests, provides encouragement from others for each member's weight loss efforts. (PX 85) It is only the food plan, however, that is at issue in this case. Group leaders stress five keys to the food plan: daily totals and weekly limits on what members can eat; exchange lists, which allow members to choose certain amounts of food from each of six food groups; so-called "lifestyle options," which allow members to individualize the program; menu planners; and checklists which members must fill out to keep track of what they eat. (Tr. 197-98) These elements are interrelated and support the basic mandate of limiting food intake.

A food "exchange" is an approximation of the caloric value of foodstuffs in a given portion size. (Tr. 1108) The exchange element of the food plan is designed to ensure that members eat a well-balanced array of foods and consume them in proper amounts. The system of food exchanges largely obviates the need for counting calories, a process that has two drawbacks: first, it is difficult and often confusing for laypeople; second, if pursued without attention to the nutrient content of food, it can lead to an unbalanced and unhealthy diet. Instead, the exchange system assures that members consume the allotted number of food exchanges of the six designated food exchange categories.

*1265 In Week One of the Weight Watchers program, a new member receives a booklet containing six exchange lists. They are for fruits, veget-

ables, fats, protein, bread, and milk. Weight Watchers explains an exchange list as a group of foods with similar caloric and nutrient content. (PX 86-A at 3) An exchange is one food item in the amount listed. Foods on the same exchange list may be selected interchangeably to fulfill that day's quota for that particular food group. (*Id.*) For example, in the first week, a woman must consume 2 to 3 fruit exchanges, at least 3 vegetable exchanges, 3 fat exchanges, 5 to 6 protein exchanges, 2 bread exchanges, and 2 milk exchanges per day.^{FN2} Amounts are somewhat different for men and teenagers. (*Id.* at 1)

FN2. For example, to fulfill the daily total for fruit exchanges, a member could select from a variety of fruit exchanges listed in the Week One booklet, including one small apple, 1/2 medium banana, one small orange, one cup of strawberries, and 1/2 cup of orange juice, among other choices. (*Id.*) To meet her intake requirements under the bread exchange list, she could choose two items from among a list of entries including a one-ounce slice of bread, 3/4 oz. of cold cereal, 3 tbsp. of flour, and 1/2 board of matzo, among other choices. (*Id.*)

In addition to the exchanges, members are allotted a certain number of "optional calories" each week—that is, an allowance of calories members can "spend" by eating certain foods over and above the exchanges allotted for each day or week. (See, e.g., PX 86-A at 3). During the first week of the program, a member may spend 150 optional calories on foods listed on "options lists" in the Weight Watchers booklets. These optional calorie foods include limited quantities of cocoa, honey, ketchup, jam, or extra amounts of foods listed under the exchanges. Each week for the next four weeks of the program, the exchange lists are expanded to include more food options and the optional calorie allowance is expanded to 500 calories.^{FN3}

FN3. For instance, on Week Three, grapes

are added to the fruit exchange list, so that a member can fulfill a fruit exchange with either 20 small grapes or 12 large ones. (PX 86-C at 1) By Week Five, if a member chooses, she could use up to 500 calories on alcoholic beverage, chocolate, or cookies. (Pl.Exh. 86-E at 8)

The program also places weekly limits on specific foods which are high in calories, fats and cholesterol, such as eggs, hard or semisoft cheese, beef, lamb or pork, and organ meats. (PX 86-A at 6) These foods fall under the "protein" exchange categories; when they are ingredients in Weight Watchers products, their presence is specially noted in parentheses so members know that they are consuming "limited exchanges." (DX JG) Further, although members are allowed unlimited vegetable exchanges, no more than one of these vegetable exchanges per day may be fulfilled by eating tomato products or juices. (PX 86-E at 5)

The concept of using food group "exchanges" in diet plans did not originate with Weight Watchers. Exchanges simplify a meal planning system by reducing calorie intake while at the same time providing easy values that a dieter can remember without having to count calories. (Tr. 1109) Dieticians for many years have used food exchanges in their work; a dietician, by examining a recipe and nutritional information for a commercial food product, can assign exchange values to the product to allow its use in a diet program. (Tr. 1111-12) The system of exchanges the dietician uses may vary depending upon the goal of the diet—that is, whether the diet is meant for weight loss or to limit certain foods for medical reasons. (Tr. 1108) But exchange values used in weight loss diets are similar, whether they are set by Weight Watchers or other dieticians. The American Dietetic and American Diabetic Associations (ADA) publishes exchange lists for foods, meant to be used by people with diabetes and people on weight loss programs; these exchange categories are quite similar to the ones used by Weight Watchers. (DX LK, LL, LM) The ADA

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

has been using the exchange concept and providing exchange lists to nutritionists and dieticians for many years, and in fact used the term "exchange" before Weight Watchers did. (DX LK at 060438) Stouffer lists ADA exchanges*1266 for each Lean Cuisine entree on the product's box.

In 1984, Weight Watchers developed a new diet program called Quickstart, which was designed to help members lose weight faster by further reducing their calorie intake in the first few weeks. (Tr. 46-47) It was at this time that Weight Watchers formally adopted the system of "exchanges"; prior to that, it used other terms such as "servings." (Tr. 615) Stouffer alleges that one of the primary objectives of Weight Watchers' new food plan and its optional calories was to sell more Foodways frozen meals and to discourage members from buying competitors' frozen diet meals. Although there is no evidence that the new plan was meant to hinder competition, there is evidence that Weight Watchers changed the diet in response to Foodways' concern that in the first two weeks of that plan members could not eat most of Foodways' frozen meals. (DX ES, EQ)

When Weight Watchers first showed the plan to Foodways, Foodways strenuously objected to the new plan because of the short lead time Weight Watchers gave Foodways to change its products, and because the plan limited use of Foodways entrees; an intramural dispute between the two Heinz-owned companies ensued. (DX ES, EV) As a result, Weight Watchers changed the plan to include "optional calories." This system of optional calories allowed members to use almost all Weight Watchers brand products even at the beginning of the diet. (DX EQ, ES, ET, Tr. 122-128)

It is evident that since the Heinz takeover, the Weight Watchers program has been somewhat influenced by the interest of Heinz, including its subsidiaries, to sell low calorie products. Nevertheless, Stouffer's contention that this undisclosed influence constitutes misrepresentation by Weight Watchers is absurd. The primary goal of Weight Watchers is

still to help its members lose weight, and Stouffer has presented no evidence to the contrary. Indeed, there is no evidence that Weight Watchers followed suggestions by Foodways to instruct Weight Watchers group leaders to push Weight Watchers frozen meals at group meetings (Tr. 131), although group leaders do hand out information and coupons for Weight Watchers food products at these meetings. (Tr. 131-132)

C. Frozen Food and the Weight Watchers Program

Each box of Weight Watchers brand frozen entrees lists the Weight Watchers exchanges for that entree. These exchanges are calculated by Weight Watchers' manager of license operations, Allen Ho. Ho also supervises Weight Watchers' quality control of Foodways and other licensees' products. (Tr. 620-622; 643-45) Ho testified at trial that he calculates exchanges in consultation with the nutrition department based upon published program information given to Weight Watchers members and leaders, and other "guidelines"—some in his head and some written down—that govern the calculation of exchange values for ingredients used specifically in processed food, such as preservatives, flavorings and texturizing ingredients. (Tr. 622-624; 630-634) As discussed below, in Section III of this opinion, Ho's decisions, based on undisclosed criteria, seem in some instances to be arbitrary.

D. Stouffer's Advertisements

When Stouffer Food Corporation launched its Lean Cuisine product line in 1981, it began to offer by mail booklets listing ADA exchanges and Weight Watchers exchanges for Lean Cuisine entrees. (DX G, H, I, J, K; Tr. 803-804) In 1987, Stouffer attempted to schedule an advertisement in Weight Watchers magazine, but the magazine rejected the advertisement. (DX JK; Tr. 805-806) In June and September 1987, Stouffer ran an advertisement in *Parade* magazine with the headline "LEAN CUISINE ENTREES PRESENT 25 WAYS TO GET MORE SATISFACTION FROM YOUR WEIGHT WATCHERS PROGRAM," and a smaller headline: "WEIGHT WATCHERS EX-

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

CHANGES FOR LEAN CUISINE ENTREES." (PX 9; Tr. 807) Below these headlines, and taking up most of the space in the ad, were pictures*1267 of Lean Cuisine entree boxes for each of the 25 entrees. Under the picture of each box, Weight Watchers exchange information was listed. At the very bottom of the ad, in small print, Stouffer placed the disclaimer: "Weight Watchers is a registered trademark of Weight Watchers International, Inc. The exchanges provided here are based solely on published Weight Watchers exchange information and do not imply approval or endorsement of those exchanges or of LEAN CUISINE entrees by Weight Watchers International, Inc." A dotted line broken by the phrase "clip here" framed the perimeter of the advertisement. This configuration suggests the ad was meant to be cut out and affixed to a wall, bulletin board or perhaps by magnets to a refrigerator door, where it could be consulted in aid of selecting a Lean Cuisine frozen entree.

In June, 1987, Weight Watchers sent a "Flash Bulletin" to its North American franchisees alerting them to the claim that Lean Cuisine fits into the Weight Watchers program, and emphasizing that group leaders should respond to any questions about this ad by saying that "we only stand behind Weight Watchers products and any claims by other products cannot be substantiated. We do not dispute or confirm claims by other companies. Stouffer's Lean Cuisine remains a separate company with no affiliation to Weight Watchers." (DX BC) This statement echoes a section of the Weight Watchers guide for group leaders. (DX BC)

In January 1988, Stouffer ran a slightly different advertisement in *Parade* magazine. (Tr. 815) This one declared in different typeface: "Stouffer's presents Weight Watchers exchanges for all 28 Stouffer's Lean Cuisine entrees." (PX 10) As in the previous ad, the boxes were depicted with the Weight Watchers exchange information below each, and a dotted line framed the pictures of the boxes and most of the copy. The disclaimer in this advertisement, although slightly larger than in the

previous ad, was printed below the line where consumers were supposed to cut out the advertisement.

Also in January, 1988, Stouffer conducted a direct mail campaign in which it sent a letter, a copy of the 1988 Lean Cuisine advertisement (PX 10) and a coupon to Weight Watchers members. (PX 11; DX BD)

In April, 1988, Charles Berger, the President and Chief Executive Officer of Weight Watchers, sent a letter to all Weight Watchers members describing the 1988 Lean Cuisine ad, and advising members that:

"First, we want you to know that Weight Watchers did not sponsor or otherwise cooperate in this advertisement.

Second, you should be advised that Stouffer's has incorrectly represented the 'Weight Watchers Exchanges.' In no instance has Optional Exchange Information been listed, although this is indicated by the ingredients stated on the package. Similarly, Fat Exchange and Vegetable Exchange information is omitted in certain cases. Also, certain Limited Vegetable Exchanges and Protein Exchanges are not identified.

As you should be aware, Weight Watchers does not review or otherwise provide Exchange Information for commercially prepared branded food products such as Stouffer's Lean Cuisine entrees.

The only Exchange Information which we do provide and stand behind is that on Weight Watchers brand products...." (DX BT)

In February, 1989, after this litigation already had commenced, Stouffer ran a third advertisement; this one ran in newspapers and carried a coupon and the headline, "Stouffer's presents exchanges for all 35 Lean Cuisine items to fit into your Weight Watchers program." (PX 14, 15) The exchanges for these products again were listed under each picture, although these exchanges were more detailed, and

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

included footnotes showing "limited meat" choices, semisoft/hard cheese and tomato paste/puree. The same disclaimer was printed, although in this ad it appeared inside the dotted line marking where to cut out the ad.

***1268 II.**

Weight Watchers owns six registrations for its mark "Weight Watchers," which is used on and in connection with frozen food products, dry foods, a magazine, and as a service mark for the weight loss program discussed above. (PX 2-8)

Weight Watchers bases its trademark infringement and unfair competition claims on §§ 32 and 43(a) of the Lanham Act, and also brings a false advertising claim under § 43(a) of the Act. 15 U.S.C. §§ 1114(1) and 1125(a). Because Weight Watchers has registered its "Weight Watchers" trademark, it may rely upon § 32(1)(a) of the Act, *see Cuisinarts, Inc. v. Robot-Coupe Intern. Corp.*, 509 F.Supp. 1036, 1041 (S.D.N.Y.1981), which provides in pertinent part:

"(1) Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; ... shall be liable in a civil action by the registrant for the remedies hereinafter provided...."

15 U.S.C. § 1114(1). Section 43(a) of the Lanham Act makes actionable both false designation of origin and false advertising.^{FN4} 15 U.S.C. § 1125(a). The same facts which substantiate an action for trademark infringement under § 32 will support a claim for false designation of origin or sponsorship under § 43(a). *See Thompson Medical Co., Inc. v. Pfizer Inc.*, 753 F.2d 208, 213 (2d Cir.1985); *Cuisinarts*, 509 F.Supp. at 1042.

FN4. Section 43 of the Lanham Act provides that:

"Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." 15 U.S.C. § 1125(a).

A. Strength of the Mark

In analyzing whether plaintiff has proved trademark infringement or unfair competition under § 43(a), it is helpful as a threshold matter to examine how much protection the mark at issue deserves.^{FN5} *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 871 (2d Cir.1986).

FN5. Stouffer argues that Weight Watchers International has abandoned the trademark "Weight Watchers" by licensing it to related companies. The evidence shows, however, that Weight Watchers has retained control over the nature and quality of the trademarked items, (Tr. 620-22;

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321

(Cite as: 744 F.Supp. 1259)

643-45), and therefore has not abandoned the mark. See *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358 (2d Cir.1959).

"Weight Watchers" is a registered trademark. When a mark is registered under the trademark laws, the mark is "presumed to be distinctive and should be afforded the utmost protection." *Lois Sportswear*, 799 F.2d at 871 (citing *Vibrant Sales, Inc. v. New Body Boutique, Inc.*, 652 F.2d 299, 304 (2d Cir.1981), *cert. denied*, 455 U.S. 909, 102 S.Ct. 1257, 71 L.Ed.2d 448 (1982)). Proof of secondary meaning is not required when a plaintiff brings a claim for infringement of a registered trademark. *Thompson Medical Co.*, 753 F.2d at 216 n. 14.

B. Likelihood of Confusion

A trademark holder establishes a *prima facie* case of trademark infringement or unfair competition by demonstrating that the allegedly infringing use of its trademark is likely to confuse consumers as to the source of the product. *Home Box Office, Inc. v. Showtime/The Movie Channel, Inc.*, 832 F.2d 1311, 1314 (2d Cir.1987); *Mushroom Makers, Inc. v. R.G. Barry Corp.*, 580 F.2d 44, 47 (2d Cir.1978), *cert. denied*, 439 U.S. 1116, 99 S.Ct. 1022, 59 L.Ed.2d 75 (1979). The Lanham Act was *1269 designed to prevent consumers from becoming confused as to either: (1) "the relationship between the trademark holder and a competitor seeking to use that trademark or a substantially similar mark in its own marketing efforts," or (2) the source of the product. *Home Box Office*, 832 F.2d at 1314. The Act was meant also to prevent a competitor from free-riding on a trademark owner's goodwill and reputation. See *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 523 F.2d 1331, 1342 (2d Cir.1975), *quoted in Lois Sportswear U.S.A., Inc.*, 799 F.2d at 872.

Therefore, the confusion requirement should not be read too narrowly; in "order to be confused, a consumer need not believe that the owner of the mark actually produced the item and placed it on the market.... The public's belief that the mark's

owner sponsored or otherwise approved the use of the trademark satisfies the confusion requirement." *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 204-05 (2d Cir.1979). Plaintiff therefore will satisfy the confusion requirement if it proves that defendant's use of plaintiff's mark confused consumers as to plaintiff's association with or endorsement of defendant's product. See *Lois Sportswear*, 799 F.2d at 872; *Consumers Union of U.S. v. General Signal Corp.*, 724 F.2d 1044, 1052 (2d Cir.1983), *cert. denied*, 469 U.S. 823, 105 S.Ct. 100, 83 L.Ed.2d 45 (1984).

Likelihood of confusion is usually measured by applying the test formulated by Judge Friendly in *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492, 495 (2d Cir.), *cert. denied*, 368 U.S. 820, 82 S.Ct. 36, 7 L.Ed.2d 25 (1961). This test examines the strength of the mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap between his product and the alleged infringer's, actual confusion, the defendant's good faith, the quality of defendant's product, and the sophistication of the buyers. *Polaroid*, 287 F.2d at 495. The *Polaroid* test, however, is not a rule or rigid formula, but rather is a useful guide to help measure the likelihood of confusion that must be applied with due regard for the "peculiar circumstances" of each case. *Lois Sportswear*, 799 F.2d at 872.

[3] This case is peculiar in relation to the *Polaroid* test, because that test was developed to judge likelihood of confusion when determining "how far a valid trademark shall be protected with respect to goods other than those to which its owner has applied it...." *Polaroid*, 287 F.2d at 495. Here, defendant did not use plaintiff's trademark to designate its own product, but instead used it in "compatibility" advertising, or advertising about the product's fit with a competitor's product or service. Such compatibility advertising is similar to comparative advertising in that it provides useful information to consumers. So, for example, a competitor may use

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

another's trademark when providing information about the substitutability of products because by doing so the "supplier engages in fair competition based on those aspects—for example, price—in which the products differ." *American Home Products v. Barr Laboratories*, 656 F.Supp. 1058, 1068 (D.N.J.), *aff'd*, 834 F.2d 368 (3d Cir.1987). The Lanham Act thus does not prohibit all unauthorized use of a trademark. "Trademarks of a rival company can be used in competitive advertising, so long as the advertising 'does not contain misrepresentations or create a reasonable likelihood that purchasers will be confused as to the source, identity, or sponsorship of the advertiser's product.' " *Cuisinarts, Inc.*, 509 F.Supp. at 1042 (quoting *Smith v. Chanel, Inc.* 402 F.2d 562, 563–64 (9th Cir.1968)).

In cases alleging trademark infringement in comparative advertising—usually based on preliminary injunction hearings rather than full-fledged trials—judges in this circuit have evaluated the likelihood of confusion on their own by looking at the facial ambiguity of the advertisements, as well as proof of actual confusion such as consumer surveys, to determine whether such confusion is likely. *See Home Box Office*, 832 F.2d 1311; *Cuisinarts, Inc.*, 509 F.Supp. at 1043. *See, e.g., Consumers Union*, 724 F.2d 1044 (§ 43(a) claim).

*1270 Based upon the *Polaroid* test and upon the facial ambiguity of the first two advertisements at issue in this case, there is a considerable likelihood that the 1987 and 1988 advertisements (PX 9, 10), would cause confusion as to Weight Watchers' endorsement or sponsorship of, or affiliation with, the Lean Cuisine products, and thus infringe Weight Watchers' trademark. But there is not such a likelihood that the most recent advertisement (PX 14, 15) would cause confusion, and thus it does not infringe Weight Watchers' trademark.

1. The Polaroid Factors

The first *Polaroid* factor, strength of the mark, supports plaintiff's claim. As discussed above, "Weight Watchers" is a registered mark, which is

presumed to be distinctive. Further, absent trademark registration, strength of mark is determined by classifying marks in ascending order as: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir.1976). If the mark is generic, it is not entitled to protection even with proof of secondary meaning; if the mark is descriptive, it is entitled to protection upon proof of secondary meaning; and if the mark is suggestive or arbitrary, it is entitled to protection even absent proof of secondary meaning. *Paper Cutter, Inc. v. Fay's Drug Co., Inc.*, 900 F.2d 558, 561–62 (2d Cir.1990). Plaintiff has presented ample evidence that the "Weight Watchers" mark is a strong one; not only is it suggestive rather than descriptive, but Weight Watchers food products and the Weight Watchers diet have enjoyed such success over the past 25 years that the secondary meaning attached to the mark is indisputable. *See Papercutter, Inc.*, 900 F.2d at 564.

Stouffer proffers the affirmative defense that it did not use the phrase "Weight Watchers" as a trademark or service mark, but rather to describe or identify, in good faith, the diet plan or company "Weight Watchers." (Answer ¶ 46) Defendant seems to argue also that the phrase "Weight Watchers Exchanges" is different from the phrase "Weight Watchers," and thus cannot be excluded from use. (Answer ¶ 58) Indeed, plaintiff cannot preclude all uses of the "Weight Watchers" trademark, but this does not prevent the phrase from being a trademark. Defendant itself seems to concede that "Weight Watchers" is a well-known name identifying the brand and diet plan by using the mark in its advertisement to try to attract Weight Watchers members to Lean Cuisine frozen foods.

The second factor, proximity of products, also weighs in favor of plaintiff. Stouffer's Lean Cuisine brand competes directly with Weight Watchers brand frozen entrees; in fact, some of the entrees featured in the Lean Cuisine advertisements even have the same names as Weight Watchers' frozen

entrees.^{FN6} (See PX 10; DX IV) The third factor, bridging the gap, is irrelevant; Stouffer's Lean Cuisine and Foodway's Weight Watchers products occupy the same market.

FN6. Both brands make Chicken Cacciatore, Pepperoni French Bread Pizza, Cheese French Bread Pizza and Deluxe French Bread Pizza. They also make entrees with similar names: *e.g.*, there is a Lean Cuisine "Breast of Chicken Parmesan," and a Weight Watchers "Breaded Chicken Patty Parmigiana."

The fourth factor, actual confusion, will be discussed in subsection 2 below.

The fifth *Polaroid* factor, defendant's intent in using plaintiff's mark, favors neither plaintiff nor defendant. There is no evidence that defendant meant to cause confusion as to endorsement or sponsorship by Weight Watchers;^{FN7} the purpose of the *1271 advertising campaign was to reach Weight Watchers members and convince them to eat Lean Cuisine by listing purported Weight Watchers exchanges, not to imply that Weight Watchers endorsed Lean Cuisine. (Tr. 808-09) Although Stouffer did intend to take advantage of Weight Watchers' goodwill by using the Weight Watchers trademark, *see Grotrian, Helfferich, Schulz*, 523 F.2d at 1342, this is not a case of copying, in which awareness of a party's registered mark could signal bad faith. *See Centaur Communications v. A/S/M Communications*, 830 F.2d 1217, 1227-28 (2d Cir.1987). Rather, Stouffer's intent to use the Weight Watchers trademark in a compatibility advertisement cannot weigh in favor of plaintiff here regardless of Stouffer's purposeful exploitation of the Weight Watchers trademark, because unlike instances of purposeful copying, compatibility ads are meant to convey product information useful to consumers if conveyed accurately.

FN7. Plaintiff claims that a market research study that Stouffer commissioned in 1987 to examine consumers' recall of the

first Stouffer ad in *Parade* magazine indicated confusion and thus alerted Stouffer early on that the ads would cause consumer confusion. (DX CQ) But the researchers' findings revealed that when readers of the magazine were asked if they recalled seeing any advertisements in that issue, 5 percent recalled a Lean Cuisine ad, while 1 percent recalled a Weight Watchers ad. Then, the researchers asked those who did not remember a Lean Cuisine ad if they recalled seeing an ad for a lower calorie frozen dinner, and 14 percent recalled a Lean Cuisine ad, while 3 percent recalled a Weight Watchers ad. Finally, for those who still did not recall a Lean Cuisine ad, the researchers named four specific brands. Plaintiff argues that because 16 percent of those surveyed thought they saw a Weight Watchers ad, Stouffer knew of possible confusion, and thus ran the ad campaign in bad faith. But 20 percent of those surveyed thought they saw a Budget Gourmet Slim Line advertisement in that magazine, and 12 percent thought they saw a Classic Lite advertisement. Thus, the survey did not necessarily alert Stouffer to possible confusion over a specific ad, but merely demonstrated that many consumers do not remember the ads they have seen, and confuse, in an abstract way, various diet frozen entrees.

The sixth *Polaroid* factor, the quality of defendant's product, is not relevant here. Although the parties no doubt would strenuously disagree, I do not find that one product is superior in quality to the other; both reach the same market and sell in the same price range.

Finally, the last *Polaroid* factor examines the sophistication of buyers. Allegedly, less sophisticated buyers spend less time examining the product and thus are more likely to be misled or confused. *See McGregor-Doniger Inc. v. Drizzle Inc.*, 599

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

F.2d 1126, 1137 (2d Cir.1979). Plaintiff argues that the general public is not knowledgeable about "exchanges," and thus the reference to exchanges in the advertisement is likely to confuse consumers about the connection between Weight Watchers and Stouffer. Plaintiff argues also that because the price of the products is low, consumers spend less time considering the purchase and are more likely to become confused between the two products.

These arguments are valid when applied to people who are not Weight Watchers members or are otherwise not knowledgeable about diet programs and foods. But those people are also less likely to be potential consumers of diet foods, and as to more sophisticated buyers, the sophistication factor can cut the other way. The advertisement is targeted toward (Tr. 808-09) and would catch the attention of Weight Watchers members (DX CQ at 11), who not only are quite sophisticated about the exchange system and their knowledge about food products, but are likely to spend time considering their food purchases and figuring out whether these purchases can fit into their diet program. Other people who buy low calorie frozen food also are likely to be on diets or watching their weight, and thus more careful and knowledgeable about the foods they buy. Therefore, potential buyers of the product are less likely to be confused.

On the other hand, Weight Watchers members are the people who are most vulnerable to defendant's use of the Weight Watchers mark. Their mistaken belief that Weight Watchers endorses Lean Cuisine products would be most likely to prompt them to buy Lean Cuisine frozen foods. Therefore, an advertisement could confuse sophisticated buyers no matter how long they contemplate their purchases if the advertisement confuses them about a subject that constitutes part of their "sophistication."

Although the sophistication-of-the-buyers factor here cuts both ways, I find that because the ad was specifically geared toward Weight Watchers members—who know from what they hear at

Weight Watchers meetings that Stouffer and Weight Watchers are not connected, and who are likely to read the fine print of an *1272 advertisement that lists exchanges for frozen entrees, particularly when, as in the 1989 ad, that fine print is a part of the ad they are supposed to clip and save, and when that print is at least as prominent as the exchanges themselves—this factor favors defendant. But this does not mean, as discussed below, that the first two ads do not use the Weight Watchers mark in a manner confusing enough to befuddle both Weight Watchers members and ordinary impulsive consumers.

2. Actual Confusion

(a) Market Research Surveys

The "actual confusion" factor was one of the major battlegrounds in this case, and both sides commissioned experts to conduct consumer surveys to test whether the Stouffer advertisements engendered confusion. As might be expected, each side's expert on market research came to a conclusion that disfavored the other: Weight Watchers' survey found confusion, while Stouffer's survey revealed no confusion. Both surveys contained serious methodological flaws discussed below. Consequently, I accord plaintiff's survey slight weight, with strong misgivings about its improper universe and improper miscategorization of responses. I accord no weight to defendants' survey, which was designed to reveal no confusion no matter how confusing the ad at issue actually was.

[4] While a survey may establish likelihood of confusion, the survey must "have been fairly prepared and its results directed to the relevant issues." *Universal City Studios v. Nintendo Co., Ltd.*, 746 F.2d 112, 118 (2d Cir.1984) (quoting *National Football League Properties, Inc. v. Wichita Falls Sportswear, Inc.*, 532 F.Supp. 651, 657 (W.D.Wash.1982)). The criteria for the trustworthiness of survey evidence are that: (1) the "universe" was properly defined; (2) a representative sample of that universe was selected; (3) the questions to be asked of interviewees were framed in a clear, pre-

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321

(Cite as: 744 F.Supp. 1259)

cise and non-leading manner; (4) sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted; (5) the data gathered was accurately reported; (6) the data was analyzed in accordance with accepted statistical principles and (7) objectivity of the entire process was assured. *Toys R Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F.Supp. 1189, 1205 (E.D.N.Y.1983). A court may place such weight on survey evidence as it deems appropriate, and many courts have ignored such evidence when it does not meet the criteria. See *Universal Studios*, 746 F.2d at 118; *Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312, 317 (2d Cir.1982); *Inc. Pub. Corp. v. Manhattan Magazine, Inc.*, 616 F.Supp. 370, 390-94 (S.D.N.Y.1985), *aff'd*, 788 F.2d 3 (2d Cir.1986); *American Home Products*, 834 F.2d at 371.

[5] At trial, plaintiff introduced three market research studies—one for each Lean Cuisine ad—overseen by William Weilbacher, a former advertising research executive and the president of Bismark Corporation, a marketing and advertising consulting firm. (PX 82) Plaintiff introduced reports summarizing the method and findings for each of the studies (PX 27A-C), questionnaires both for screening respondents and asking the main questions (PX 28B, 29B, 30B), survey coding materials (PX 27-AA, 27-BA, 27-CB, 27-CC, 27-CD), and reports validating respondents' participation in the survey. (PX 28-A, 29-A, 30-A) In this study, participants were approached in shopping malls and asked preliminary questions to determine whether they qualified for the "universe" of the survey. The universe of the Weight Watchers surveys was defined as women between the ages of 18 and 55 who have purchased frozen food entrees in the past six months and who have tried to lose weight through diet and/or exercise in the past year. (PX 27-A, 27-B, 27-C, Tr. 235)

The Weilbacher studies did not limit the universe to consumers who had purchased a *diet* frozen

entree (Tr. 269), or who had tried to lose weight through diet as opposed to exercise; therefore, some of the respondents may not have been in the market for diet food of any kind, and the study universe therefore was too broad. Sloppy *1273 execution of the survey broadened the universe further when interviewers mistakenly including participants who did not qualify even under Weilbacher's standards. For example, on some of the qualifying surveys, not all of the questions qualifying participants for the universe were answered; therefore, it is impossible to discern whether the respondent fit within the defined universe. (Tr. 342-351; PX 28-B, 29-B, 30-B) Flaws in a study's universe quite seriously undermine the probative value of the study, because to "be probative and meaningful ... surveys ... must rely upon responses by potential consumers of the products in question." *Dreyfus Fund Inc. v. Royal Bank of Canada*, 525 F.Supp. 1108, 1116 (S.D.N.Y.1981), *quoted in Universal Studios, Inc.*, 746 F.2d at 118. See also *Inc. Pub. Corp.*, 616 F.Supp. at 393. Respondents who are not potential consumers may well be less likely to be aware of and to make relevant distinctions when reading ads than those who are potential consumers. The ability to make relevant distinctions is crucial when what is being tested is likelihood of confusion.

Further, the results of plaintiff's market study overstated actual confusion as to source or endorsement engendered by the advertisement by testing for any "connection" between Stouffer or Lean Cuisine and Weight Watchers in consumers' minds after reading the ad. Interviewers first asked participants to look at three different print advertisements, one of which was the Lean Cuisine ad, and identify who sponsored the advertisement and why the person thinks so. Then, they told participants to look again at the Lean Cuisine ad, and to determine whether "you think there is any connection between Stouffers Lean Cuisine and Weight Watchers, or not?" If participants found a connection, they were asked to describe the connection.

In analyzing the responses, Weilbacher divided

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

the connections seen by respondents into 6 categories: (1) there is a business connection between the two companies; (2) "the ad connects them—Stouffer's 'presents' Weight Watchers"; (3) Stouffer's used the Weight Watchers exchanges; (4) Stouffer's products are interchangeable with Weight Watchers; (5) both products are diet foods; (6) all other single mentions. (PX 27-C at 085491; 27-B at 085006; 27-A at 080007) Therefore, although the study relating to the 1989 advertisement found that 63.5 percent of respondents saw a connection between Stouffer's Lean Cuisine and Weight Watchers, Weilbacher found that 13.2 percent of total respondents saw a "business connection" between the two companies.

Only the "business connection" category shows confusion as to source or endorsement, and thus only this category is relevant to plaintiff's infringement claim. Some of the responses which Weilbacher placed within that category, when examined individually, do not show such confusion. For example, in the survey for the 1989 ad, Weilbacher categorized 24 respondents in Pittsburgh as having found a business connection, but only 13 individual responses, allegedly taken down verbatim, seem to indicate a confusion as to the relationship between Weight Watchers and Stouffer or Lean Cuisine. (PX 27-C at 085492-93) Weilbacher reports that 16 respondents from Providence who allegedly saw a business connection; I agree only as to 13. (PX 27-C at 085493-94) As to the other 39 respondents, from Portland-Vancouver and Fort Worth, I agree with Weilbacher's categorizations in only 29 cases. (PX 085494-97) Therefore, after examining the individual responses to the Weilbacher survey, I find that only 9.2 percent of respondents were confused as to endorsement, sponsorship or source after reading the 1989 advertisement.

In his other studies, Weilbacher found that 14.7 percent, or 22 out of 150 respondents thought there was a business connection after reading the 1987 ad. (PX 27-B at 085006) I found only 8.6 percent, or 18 out of 150 respondents, who indicated that

they saw such a connection. Weilbacher found that 17.7 percent, or 54 out of 305 respondents inferred such a connection from the 1988 advertisement. (PX 27-A at 080007) I found that 15.1 percent, or 46 of these respondents, saw a business connection.

***1274** Plaintiff argues that in Lanham Act cases, courts sometimes have relied on relatively small showings of actual consumer confusion to find likelihood of confusion and thus infringement. *See Grotrian, Helfferich, Schulz, etc. v. Steinway and Sons*, 365 F.Supp. 707, 716 (S.D.N.Y.1973), *aff'd* 523 F.2d 1331 (2nd Cir.1975) (7.7 percent business connection and 8.5 percent name confusion); *RJR Foods, Inc. v. White Rock Corp.*, 603 F.2d 1058, 1061 (2d Cir.1979) (15 to 20 percent consumer confusion); *McDonald's Corp. v. McBagel's, Inc.*, 649 F.Supp. 1268, 1277 (S.D.N.Y.1986) (24.8 percent confusion). In these cases, however, at least 15 percent of consumers were confused as to source or endorsement, while here, at least as to the 1989 advertisement, the study shows 9.2 percent confusion. More important, however, is that even accurate and probative market research does not conclusively decide the issue of likelihood of confusion in Lanham Act cases. *See McBagel's, Inc.*, 649 F.Supp. at 1278; *Worthington Foods, Inc. v. Kellogg Co.*, 732 F.Supp. 1417, 1446 (S.D. Ohio 1990). Here, the flaws in plaintiff's market research methods lead me to accord very little weight to the results, *see Universal Studios, Inc.*, 746 F.2d at 118, and therefore such results do not affect my conclusion that as to the 1989 advertisement, there is little likelihood of confusion.

The market study conducted for defendants in this case has even less probative value. It is obvious that Dr. Jacob Jacoby, a veteran of the trademark litigation arena and the creator of the Stouffer survey,^{FN8} constructed the study specifically to disprove consumer confusion regardless of participants' reactions to the advertisements. Jacoby's study focused on confusion as to the goal or source of the advertisement, but did not focus upon confusion as to endorsement from the message in the ad-

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

vertisement; as the study report itself explains, "[t]he basic objective of this investigation was to determine whether ... respondents would incorrectly identify Weight Watchers as the product-service being advertised or as the source of the Lean Cuisine advertisement." (DX MJ at 4)

FN8. This is not the first time Jacoby's survey findings have been criticized. See *American Home Products*, 656 F.Supp. at 1070; *Worthington Foods, Inc.*, 732 F.Supp. at 1446. Similarly, Weilbacher's studies also have previously been criticized by courts. See *Coca-Cola Co. v. Tropicana Products, Inc.*, 538 F.Supp. 1091, 1094-95 (S.D.N.Y.1982), *aff'd*, 690 F.2d 312 (2d Cir.1982).

Respondents first were screened for membership in the universe, which Jacoby defined as including both males and females, aged 18 to 55, who in the past six months either bought frozen food meals or snacks for themselves or someone else in their household, ate any frozen meal or snack, or were involved in selecting the brand of frozen foods used in their household. The survey excluded those who worked in certain industries, people who normally wore eyeglasses but did not have the glasses with them, and people who had participated in a market research study in the past three months. (DX MJ at 8) As with the Weilbacher survey, the universe here does not focus upon people who ate diet or low-calorie frozen foods or even people who were trying to lose weight through dieting. Although the screener questionnaire did contain a question asking whether respondent had eaten frozen food as part of a plan to lose weight, this question was not used to narrow the universe for the study as a whole.^{FN9} Although the universe was thus flawed, that was not the main problem with the study. The study's two major shortcomings were its failure to focus on the kind of confusion that was at issue in this case, and its use of "control" advertisements supposedly to show that consumers were generally confused about advert-

isements and thus to justify disregarding most confusion as irrelevant "noise."

FN9. In his report, Jacoby mentions that 52 of those sampled had eaten frozen foods as part of a plan to lose weight, and that 6 of these, or 11.5 percent, were classified as confused. This finding is interesting considering that in the over-all sample, Jacoby found that 9 percent of respondents were confused about the Lean Cuisine ad; therefore, it would seem from his study that, although it sounds unlikely, a higher percentage of people familiar with frozen diet food were confused.

*1275 In the main part of the study, participants were shown three different advertisements, including the 1989 Stouffer ad mentioning Weight Watchers. The two other advertisements also involved two products each: one seemed to be jointly sponsored by Japan Airlines and AT & T, proclaiming that a JAL ticket will get you to Tokyo in about 14 hours, while an AT & T card will get you back to the U.S. in about 14 seconds; (DX MJ App. A) the second was a comparative advertisement showing that Now cigarettes have 3 mg. of tar while Carlton 100's cigarettes have 5 mg. of tar. (DX MJ App. A) After being shown each advertisement, participants were asked what product or service was being advertised; when respondents did not know, the interviewer asked whose product or service was advertised, and when respondents did know, the interviewer asked who placed the ad. As to the Lean Cuisine ad, which was always shown last, the interviewer asked in addition whether the respondent noticed the name "Weight Watchers" in the ad, and whether or not the name Weight Watchers meant anything to the respondent. (DX MJ App. B)

The confusion which the study attempted to record, therefore, related to whose products were being advertised and who placed the ad. The study did not consider the possibility that consumers would know that Stouffer or Lean Cuisine placed the ad, while also thinking that Lean Cuisine and Weight

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

Watchers were part of the same company, cooperating, or endorsing each other's products. Although Jacoby tried to mitigate this problem by adding extra questions about the Lean Cuisine ad, these questions did not focus upon the use of the name "Weight Watchers" in the ad, but seemed designed to elicit the respondent's perception of Weight Watchers in general, wholly apart from the advertisement.

Further, although Jacoby found in his study that 9 percent of the respondents were confused as to the Lean Cuisine ad, Jacoby used the control ads to "adjust for noise factors (such as guessing) and the level of confusion that might be expected when these particular respondents would look at any ad. When this adjustment is made, it can be seen that the level of confusion that can be attributed to the Lean Cuisine ad is essentially zero." (DX MJ at 24) The problem with this method is that it assumes that the existence of confusion in these other ads sets a constant or permissible level of confusion which an ad mentioning more than one product must exceed in order to be actionable. Not only is this an incorrect assumption, but it also assures a party's control over the study's outcome by use of the control ads.

Jacoby's theory of "noise" is based upon his previous research on miscomprehension of communications, where he found that in general, 15 to 23 percent of people tested miscomprehend magazine advertisements.^{FN10} (Tr. 1237) But in the study at issue, Jacoby eliminated "noise" based upon high confusion over the control ads, at least one of which—the JAL/AT & T ad—was in fact extremely confusing as to source, sponsorship and endorsement. It is not surprising that when shown an advertisement that seemed to promote both JAL tickets and AT & T, 31.8 percent of respondents were confused, or that when shown an ad comparing two kinds of cigarettes, stating merely that one was "lowest," 32.7 percent of respondents, many of whom may well have been non-smokers, were confused. Confusion responses were deceptively higher

for control ads than for the Lean Cuisine ads also because respondents all had eaten or had helped choose frozen meals, but did not necessarily smoke or use long distance services, and thus were more sophisticated *1276 and knowledgeable with respect to the Lean Cuisine ad.^{FN11}

FN10. In *Quality Inns Intern., Inc. v. McDonald's Corp.*, 695 F.Supp. 198 (D.Md.1988), Jacoby conducted a survey for Quality Inns to show lack of confusion over the company's proposed "McSleep Inn" hotels. The court, finding a certain amount of confusion, wrote that "[b]oth experts acknowledged that there are inherent distortions in surveys which they call 'noise.' But none estimated that the extent of this noise would ever rise above a few percentage points." *Quality Inns Intern., Inc.*, 695 F.Supp. at 219. That finding seems to contradict Jacoby's testimony here.

FN11. Although the screener questionnaire asked whether respondents used cigarettes, airlines or long distance services, it did not screen out those who answered these questions negatively. (PX 71-M)

The flaws in the universe, design and interpretation of defendants' study undermine its probative value, and it deserves no weight in measuring actual confusion over the 1989 advertisement.

(b) *The Confusing Presentation of the Ads*

Although courts must focus upon "market conditions instead of in-chamber inspections" when determining the existence of actual confusion, courts may combine empirical evidence with visual inspection of the allegedly infringing use as part of this determination. See, e.g., *Charles of the Ritz Group, Ltd. v. Quality King Distributors, Inc.*, 832 F.2d 1317, 1322 (2d Cir.1987). Further, because both parties' surveys are highly problematic, it is important to examine whether the ads are confusing on their face.

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

The 1987 advertisement that Stouffer placed in *Parade* magazine carried a large headline with pictures of Lean Cuisine boxes below. The headline read: "Lean Cuisine Entrees Present 25 Ways To Get More Satisfaction From Your Weight Watchers Program," and then in smaller letters, "Weight Watchers Exchanges For Lean Cuisine Entrees." (PX 9) One easily could conclude from reading the ad not only that Lean Cuisine is helping people get more satisfaction from their Weight Watchers program, but also that the Lean Cuisine brand is affiliated with the Weight Watchers program or that Weight Watchers endorses Lean Cuisine entrees.

[6] Although this advertisement contains a disclaimer that the exchanges it lists are based solely on published Weight Watchers information, and that the list of exchanges does not imply approval or endorsement of those exchanges by Weight Watchers, this disclaimer appears in minuscule print on the very bottom of the ad. Because of its location and size, the disclaimer does not effectively eliminate the misleading impression conveyed in the ad's large headline.

Disclaimers that emphasize the source of a product often can reduce or eliminate consumer confusion, and have been used by courts as remedies in trademark cases. *See Soltex Polymer Corp. v. Fortex Industries, Inc.*, 832 F.2d 1325, 1328 (2d Cir.1987); *Berlitz Schools of Languages of America, Inc. v. Everest House*, 619 F.2d 211, 213 (2d Cir.1980). The Court of Appeals has held, however, that each case must be judged by considering the business and its consumers, as well as the proximity of the disclaimer to the infringing statements, and that when disclaimers are used as remedies, the burden is on the infringer to prove that they reduce the likelihood of confusion. *Home Box Office*, 832 F.2d at 1315. *See also Charles of the Ritz*, 832 F.2d at 1324. The Court has noted also that "there is a body of academic literature that questions the effectiveness of disclaimers in preventing consumer confusion as to the source of a product," specifically, an article co-authored by Stouffer's own survey expert,

Dr. Jacob Jacoby. *Home Box Office*, 832 F.2d at 1315. *See Jacoby & Raskoff, Disclaimers as a Remedy for Trademark Infringement Litigation: More Trouble Than They Are Worth?*, 76 *Trademark Rept.* 35 (1986).

[7] The next advertisement, run in January 1988, carried an even more confusing headline: "Stouffer's presents Weight Watchers exchanges for all 28 Stouffer's Lean Cuisine entrees." (PX 10) The word "presents" in between the marks "Stouffer's" and "Weight Watchers" creates the impression either that Stouffer owns Weight Watchers, or more likely that Stouffer is presenting these exchanges for Weight Watchers—in other words, that Weight Watchers gave Stouffer the exchanges to publish in the ad. This headline is ambiguous on its face and thus threatens a strong likelihood of consumer confusion. *See Home Box Office*, 832 F.2d at 1315; *Cuisinarts, Inc.*, 509 F.Supp. at 1043.

*1277 [8] Further, the disclaimer for this advertisement not only is printed in small type, but appears below the dotted line that suggests where consumers should cut out the ad if they wish to use it for reference. Thus, a Weight Watchers member who cuts out the ad in order to keep a copy of the exchanges would then consult the ad each time without seeing the disclaimer. Therefore, the disclaimer cannot eliminate the confusion created by the misleading headline.

[9] By contrast, the 1989 advertisement (PX 14, 15) is not confusing on its face. The headline does not say that Stouffer's presents Weight Watchers exchanges, or that Stouffer's presents ways to get more satisfaction out of Weight Watchers; it states merely that Stouffer's presents exchanges for Lean Cuisine items "to fit into your Weight Watchers program." By using "exchanges" instead of "Weight Watchers exchanges," Stouffer correctly implies that Stouffer, and not Weight Watchers, calculated the exchanges for its products—an implication confirmed by the disclaimer below. The disclaimer, while in relatively small print on the bottom, appears inside the dotted line surrounding

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

the exchange information, and is in much larger type than the exchange listings themselves.

It is possible that someone completely unfamiliar with Weight Watchers frozen entrees, the Weight Watchers diet plan or any other diet involving exchanges might glance quickly at the ad and conjecture that simply because Stouffer used the Weight Watchers mark in the advertisement, Weight Watchers must have given Stouffer permission to use the trademark, and thus must not disapprove of Stouffer's Lean Cuisine entrees. However, absent a convincing showing of actual confusion, absent a facially confusing or intentionally confusing message, and absent a tipping of the balance one way or another under the *Polaroid* test, the potential for such conjecture cannot justify proscribing advertising that conveys useful information. Further, such conjecture presents a limited potential for damage to plaintiff, as it is unclear how consumers unfamiliar with diet frozen food or the Weight Watchers diet would be affected by a vague notion of connection between Weight Watchers and Lean Cuisine, even if such readers were to consider buying low-calorie frozen entrees.

Although the Lanham Act was designed to prevent a competitor from free-riding on a trademark owner's goodwill and reputation, see *Lois Sportswear*, 799 F.2d at 872, a company cannot use the Act to prevent competitors from ever referring to its trademark. "The registering of a proper noun as a trade-mark does not withdraw it from the language, nor reduce it to the exclusive possession of the registrant which may be jealously guarding against any and all use by others." *Societe Comptoir De L'Industrie Cotonniere Etablissements Boussac v. Alexander's Department Stores, Inc.*, 299 F.2d 33, 36 (2d Cir.1962).

A finding that the 1989 advertisement infringed the Weight Watchers trademark solely because it used the mark to point out Lean Cuisine's fit into the Weight Watchers program would unduly discourage companies from advertising their products' compatibility with other companies' services or

products. "The free flow of information regarding the substitutability of products is valuable to individual consumers and to society collectively, and by providing it a supplier engages in fair competition based on those aspects—for example, price—in which the products differ." *American Home Products*, 656 F.Supp. at 1068. Restricting the ability of companies to provide this information also would circumscribe commercial expression, which "assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas v. Public Service Comm. of New York*, 447 U.S. 557, 561–62, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341 (1980). Of course, companies cannot make untruthful or misleading statements; as discussed below, to the extent that the exchange information listed by Stouffer is consistently out of line with the Weight Watchers system with respect to optional calories, such inaccuracy may not be repeated.

*1278 For the above reasons, the 1987 and 1988 advertisements infringe plaintiff's trademark by creating confusion as to source and endorsement, but the 1989 ad does not.^{FN12}

FN12. Stouffer asserted numerous affirmative defenses to Weight Watchers' claims, some of which I have addressed while analyzing the trademark claims here, and some which I have not yet addressed. Most significantly, Stouffer alleges that Weight Watchers is barred by the statute of limitations, laches, estoppel and/or acquiescence from asserting any claim against defendant. There is no basis for a statute of limitations defense in this suit. The laches and estoppel defenses are discussed below in connection with defendants' counterclaims.

Defendant claims also that plaintiff's misuse of its trademark to prevent competition, unclean hands and abuse of process preclude recovery. (Answer ¶¶ 59–60) As is evident from this opinion, plaintiff's alleged misuse of its trade-

mark does not preclude an injunction against the first two advertisements. However, Weight Watchers' alleged misuse of its trademark will be discussed below in connection with Stouffer's counterclaims.

III.

Weight Watchers claims that these ads constitute false advertising under § 43 of the Lanham Act because: (a) they give the misleading impression that the Lean Cuisine meals are equivalent to or interchangeable with Weight Watchers food products, when in fact Lean Cuisine meals do not "fit into" the Weight Watchers program; (b) the advertisements do not correctly reflect the Weight Watchers exchange system; and (c) although the ads refer to and list Weight Watchers exchanges, the Lean Cuisine packages list American Dietetic Association (ADA) exchanges, which are slightly different. (Pl. Posttrial Mem. at 20-22)

Because the 1987 and 1988 ads already have been found to infringe plaintiff's trademark, it seems unnecessary to consider whether as a result of this infringement they also constitute false advertising as to endorsement or connection. The 1987 and 1988 advertising will be enjoined because it infringes; it need not be enjoined redundantly on the ground that the infringement also misleads.

As set forth in greater detail below, the evidence does not support Weight Watchers' first theory of false advertising with regard to the 1989 advertisement (PX 15), as Lean Cuisine "fits" into the Weight Watchers program, but it does support Weight Watchers' second theory. Although Stouffer's exchanges have been revised to reflect fairly accurately the Weight Watchers exchange system, there remains a consistent discrepancy in the Stouffer presentation of Weight Watchers exchanges that seems calculated to place Weight Watchers at a competitive disadvantage. Finally, Weight Watchers has failed to prove its third theory of alleged confusion, arising from the use of Weight Watchers exchanges in the ads and ADA

exchanges on the Stouffer packages.

A. *Lean Cuisine's "Fit" Into the Weight Watchers Program*

[10] Weight Watchers claims that the Lean Cuisine meals do not "fit into" the Weight Watchers program. Stouffer counters that Weight Watchers' own system of measurement for food exchanges in its frozen entrees is not exact, and that Weight Watchers itself uses considerable discretion in its exchange classifications. Stouffer points out that Weight Watchers and Foodways calculate the exchanges in an occasionally arbitrary way, that Weight Watchers itself revised its exchange information prior to bringing this law suit, and that Weight Watchers members have sent letters revealing confusion about the way in which Weight Watchers arrives at exchanges for frozen entrees. (DX HX, HZ, IA, IB, IF, IJ, IK, IL, IS)

Based on the Weight Watchers system of exchanges as provided to Weight Watchers members, the statement that Lean Cuisine entrees "fit" into the Weight Watchers program is not false. Although there may be minor discrepancies between the way Weight Watchers and Stouffer would count the food exchanges of given frozen meals, those differences do not materially affect the ability of consumers to fit Lean Cuisine into their Weight Watchers program.

***1279** The Weight Watchers program encourages variety and flexibility. Most of its recent changes were designed to diversify the program. Thus, the Weight Watchers program has expanded its array of food exchanges, has added the "optional calorie" feature, has provided members with guidance for how to "count" party foods (PX 86-G) and meals in restaurants (PX 86-I), and has expanded its product line of processed foods which comply with the program.

Further, adherence to the Weight Watchers food plan necessarily involves certain levels of approximation. For instance, in measuring a one cup serving of strawberries to meet a "fruit exchange,"

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

(PX 86-B at 1), a member may measure the strawberries whole, so as to minimize the amount of food in the exchange, or she may cut the strawberries in quarters, so as to fit more fruit into the cup, or she may cut them into thin slices, thus "squeezing" the most out of the exchange. Members are encouraged to be as precise in their measurements as possible, but there is necessarily an element of approximation. Even the Week One booklet recommends weighing and measuring not as an end in itself, but as a tool "until you become familiar with proper portions." (Pl. Exh. 86-A at 23)

Recognizing that variation is particularly significant when eating out, the Weight Watchers "Dining Out" booklet advises that because "it isn't possible to know the exact ingredients and amounts contained in each dish, and recipes do vary from one restaurant to another our guidelines provide approximate Exchanges. Nor is it possible for you to know precise portion sizes in restaurants. Use your judgment and the discerning eye you've developed these past few weeks while weighing and measuring portions at home." (PX 86-I at 7) By claiming that Lean Cuisine does not fit into the Weight Watchers program, Weight Watchers has simply refused to extend its policy of encouraging variety and flexibility to foods made by competitors of the Weight Watchers brand.

During cross-examination of Ronnie Amster, a Weight Watchers group leader and member services coordinator for Nassau County, a lawyer for Stouffer asked whether frozen foods other than those licensed by Weight Watchers can be eaten under the food plan. Amster first replied: "At the member's own responsibility. Not as fitting into the exchange program." But soon she admitted that a member could eat a frozen prepared meal other than a Weight Watchers meal while on the Weight Watchers plan if "they accept the responsibility for eating that or use the guidelines that are suggested in the dining-out guide." (Tr. 214)

Weight Watchers contends that the exchanges for Lean Cuisine entrees listed in the Stouffer ads

do not "fit" into the program because of slight discrepancies between ingredients and the exchanges. However the evidence shows that because food ingredients have mixed nutrient values, one could assign different sets of exchange values to the same product merely by categorizing foods in different ways, and Weight Watchers' own exchanges reflect subjective judgments. Stouffer cannot be expected to calculate exchanges more "accurately" than Weight Watchers itself. Weight Watchers' own nutritional expert witness, Dr. Barbara Levine, conceded that Weight Watchers' calculation of exchanges is not perfect, as "there are minor discrepancies in the comparison of [Weight Watchers'] package listings to the exchange system as presented in the Weight Watchers booklet...." (PX 43-B) For example, she found that Weight Watchers' "Cheese Pizza" entree does not conform to Weight Watchers' stated exchange guidelines because there is no exchange listing to account for the entree's corn oil and soybean oil. Neither is there a fat exchange listed on the box, where oil would ordinarily be classified, nor is the appropriate caloric value of the oil included in an optional calorie tally. (*Id.* at 087013) Nor is the sugar and modified food starch used in the product accounted for in optional calories, the only category under which sugar and cornstarch can be counted. (*Id.*, PX 86-A, Optional Calories List, at 1) Similarly, in Dr. Levine's view, Weight Watchers' "Oven Fried Fish," "Fillet of Fish Au *1280 Gratin" and "Baked Cheese Ravioli" fail to conform precisely to Weight Watchers' stated exchange guidelines. (PX 43-B)

In addition, defendant has compiled a list of foods used in the preparation of Weight Watchers frozen dinners which apparently are not included in the Weight Watchers exchange listing on the package. (DX NQ, NR) For example, in some entrees oil is a listed ingredient, yet no fat exchange listing reflects that oil is included. (Def. Exh. NR) Consumers also have noticed certain discrepancies in their calculations of exchanges from the ingredients or nutritional information on the box and the exchanges listed. (DX HZ-IV) Weight Watchers has

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

written in response that discrepancies between the exchanges listed on the package and the ingredients reflect Weight Watchers' calculation of exchanges based upon an accurate nutrition analysis for every product which complies with the program. In looking at exchanges on the boxes, "one fact to remember is [that] no food item is 100 percent of any one nutrient, such as protein, carbohydrate or fat. All foods are combinations of protein, carbohydrate, fat, water, vitamins, etc." (See DX IJ, IL, IR, IT) Weight Watchers relies on Allen Ho, its manager of license operations, to calculate the exchanges listed on Foodways boxes, and it is up to him to decide under which exchange to list a food item. In December, 1988 and January 1989, Ho reviewed the exchange statements for Weight Watchers frozen entrees and made some changes; for example, he changed the number of optional calories listed for certain entrees. (DX JB, JC) Stouffer has suggested that Weight Watchers made these changes as a result of this litigation, knowing that it would not be in a position to criticize the Lean Cuisine exchanges if Weight Watchers' own exchanges were not accurate. Regardless of the reasons for the review, such a reassessment illustrates at the very least that there may be more than one proper way to classify exchange information for a frozen entree.

Weight Watchers relied heavily in criticizing the Stouffer exchange calculations on Ho, who is the final authority in setting exchange values of frozen meals produced by Weight Watchers licensees. But Ho did not present an objective standard against which his own calculations can be measured. At bottom, Weight Watchers' position amounts to claiming that the only permissible standard for measuring the exchanges in frozen entrees is Allen Ho. However, that conflicts with the entire notion of Weight Watchers as a diet system that its members may use with foods other than those sold under the Weight Watchers name, and with the information Weight Watchers itself provides to its members. In order to generate exchanges that "fit" the Weight Watchers program,

Stouffer need not calculate the exchanges exactly as Allen Ho would calculate them; this would be an impossible feat, as Lean Cuisine does not have access to Weight Watchers' recipes, which are trade secrets, and thus does not know how Weight Watchers calculates exchanges on the products its franchisees produce from secret recipes. Nor does Stouffer have access to Allen Ho. What Stouffer must do, however, in order to "present exchanges ... to fit into your Weight Watchers Program" without being misleading is to apply all the elements of the Weight Watchers system made available to Weight Watchers members, and calculate exchanges under that system as accurately as would a scrupulous adherent to that system. Except as set forth below, Stouffer has done so.

B. *The Accuracy of Stouffer's Exchange Information*

[11] Stouffer's calculation of the six major exchange groups appears in general to be accurate, and in most entrees all ingredients seem to be accounted for under exchange categories. However, what Stouffer cannot do with impunity is to put itself at a competitive advantage by excluding categories used by Weight Watchers and manipulating its exchanges to seem more attractive to Weight Watchers members. In one respect, optional calories, that is what it has done. Stouffer has not listed optional calories for entrees containing ingredients, such as sour cream, that can be *1281 listed only as optional calories under the Weight Watchers system. DeAnne Hrabak, a nutritionist for Stouffer who calculated the exchanges for Lean Cuisine products testified that it was not necessary to put optional calories into the advertisements because—except for amounts of optional calorie food which were too insignificant to be counted—all food in the Lean Cuisine products was accounted for as an exchange when the Weight Watchers program allowed that food to be listed as either an exchange or an optional calorie food. (Tr. 991-999, 1097, 1104, 1133) In other words, many of the food items listed as optional calories are listed also on the exchange lists; so, for example, Hrabak did not

list the flour in a Lean Cuisine meal as optional calories because she instead counted it as a bread exchange according to the Weight Watcher guidelines in the Week 5 booklet. (Tr. 994; See PX 86-E at 7) This is acceptable, because it accounts for all ingredients.

Hrabak said also, however, that when foods that could be counted only as optional calories, such as sour cream, were used in the Lean Cuisine recipes, they were in amounts much smaller than the amounts listed in the Weight Watchers published materials as calling for a calculation of optional calories. Considering the low number of calories in each entree, this statement sounds correct insofar as the additional few calories would not be significant. Nevertheless, just because certain optional calorie food is listed in the Weight Watchers booklet as a "100 Calorie Food" does not mean that even a far smaller amount should not be listed as 10 or 15 optional calories; indeed, these are the amounts in which Weight Watchers lists optional calories on its own brand of food.

Stouffer's calculation of exchanges for its 1989 advertisement by giving all nutrients a value in exchanges, thereby excluding optional calories, mirrors the way in which Weight Watchers shifted nutrients from one exchange to another before this litigation began. In fact, Dr. Levine criticizes the exchange listings in the February 1989 ad in much the way that she and Stouffer have criticized the categorization of Weight Watchers entrees. Levine argues that the Lean Cuisine exchange listings fail adequately to reflect optional calories and fat exchanges. (Pl. Exh. 43-D) Weight Watchers does include optional calorie listings—usually of about 10 calories—in the exchange information on its packages. (DX JG)

The evidence suggests that Stouffer manipulated its presentation of optional calories for competitive advantage. Defendant for years has distributed booklets providing nutrition and diet exchange information for Lean Cuisine entrees. (DX I, J, and K) The 1984 booklet (DX I) shows optional calor-

ies for frozen entrees under the Weight Watchers exchange system. In the two subsequent revisions, however, (DX J and K) the optional calorie tally was omitted, often when there was no apparent change in the recipe for the relevant entree. For example, "Filet of Fish Florentine" in 1984 was described as having "3 protein exchanges, 1 vegetable exchange, 1/2 milk exchange and 15 optional calories." The serving size was described as 9 oz. and it contained 240 calories. (DX I at 201753) In the 1986 booklet, and in the 1989 ad, this entree was the same serving size and had the same number of total calories, but no optional calories were listed. (DX K at 201815) Stouffer apparently did not change "Spaghetti with Beef and Mushroom Sauce," or "Beef & Pork Cannelloni with Mornay Sauce," but here again omitted classification of optional calories in the most recent exchange information.

Further, a few of the Lean Cuisine entrees contain sour cream or wine, foods which cannot be listed as exchanges and thus should have been counted as optional calories. As discussed above, Hrabak explained that these ingredients were added in such small portions that they are insignificant. (Tr. 993-999) Nonetheless, by omitting the optional calories in these entrees, Stouffer has failed to give Weight Watchers members the same information Weight Watchers would when describing its own products.

Stouffer should include optional calorie listings when optional calorie foods—that *1282 is, foods that do not fall under any exchange except optional calories—are used. Otherwise, the exchange information will seem deceptively more attractive to Weight Watchers members who do not wish to use up their optional calorie quota.

B. ADA vs. Weight Watchers Exchanges

[12] Finally, plaintiff rests a false advertising claim on the advertisements' misleading implication, when combined with the Lean Cuisine boxes, that the Weight Watchers exchanges given in the ad are identical to the exchanges listed on Lean

Cuisine boxes. In fact, the exchanges listed on the boxes are based upon an exchange system used by the American Diabetes Association and the American Dietetic Association (ADA), while the exchanges listed in the ads are supposedly based upon the Weight Watchers exchange system. Stouffer asserts that the ADA exchanges and the Weight Watchers exchanges are virtually identical, and that by using the ADA exchanges under its own mark, Weight Watchers in effect is preventing others from using a well-established system of dieting. This contention will be discussed in the counterclaim section below; for the purpose of this false advertising claim, it can be assumed that the ADA exchanges and the Weight Watchers exchanges are different, because Weight Watchers—and thus Weight Watchers members—consider them to be different, and therefore these members would not want to be misled into confusing the two. The listing of Weight Watchers exchanges in the ads and ADA exchanges on the boxes has the potential to confuse and mislead consumers; it is quite conceivable that consumers will see the ads, buy Lean Cuisine entrees and use the exchange information on the packages without realizing that the exchanges on the boxes are not Weight Watchers exchanges. Nevertheless, plaintiff has failed to prove a false advertising claim based on this aspect of the ads because it has failed to offer any evidence of actual confusion.

When a merchandising statement or representation is literally or explicitly false, plaintiff may prevail even without proof of the advertisement's impact on the buying public. *Coca-Cola Co.*, 690 F.2d at 317; *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir.1978). If the advertisement, however, is implicitly rather than explicitly false, plaintiff can show false advertising under the Lanham Act only by presenting evidence that the public was misled, confused or deceived by the statement at issue. *Coca-Cola*, 690 F.2d at 317. The alleged misrepresentations must relate to an inherent quality or characteristic of the other product. See *Vidal Sas-*

soon, Inc. v. Bristol-Meyers Co., 661 F.2d 272, 278 (2d Cir.1981).

Although the exchange system constitutes an inherent quality or characteristic of the Weight Watchers program, and therefore can be the basis for a false advertising claim, the alleged misrepresentation that the exchanges are the same on the boxes and the ads is implicit rather than explicit. The 1987 and 1988 ads state, in the copy, that consumers should "look on the back of Lean Cuisine packages for ADA diet exchanges," and explain in a footnote that the ADA exchanges are based on diet exchanges provided by the American Diabetes Association, Inc. and The American Dietetic Association. (PX 9, 10) The 1989 ad refers to the ADA exchanges on the boxes outside the dotted line where consumers are supposed to cut out the exchange information, although there is a footnote inside the line that explains that "Diet exchange calculations on package backs are based on Exchange Lists for Meal Planning [copyright] American Diabetes Association, Inc., and The American Dietetic Association." Therefore, confusion over the exchanges listed in the ads and those listed on the boxes, if any, will result not from explicitly false representations about which exchanges are referred to in the advertisements or on the boxes, but from an inference people might draw after having seen the ad—but without having it in front of them in the supermarket—that the exchanges on the box must be the same as those in the ad.

*1283 Plaintiff has presented no evidence that consumers used the exchange information on the Lean Cuisine packages as part of their Weight Watchers program because they were misled by the ads into thinking that the exchange information on the packages would fit into their Weight Watchers Diet. Nor did plaintiff's market survey test consumers' perceptions of the exchanges given in the ad and those on the boxes. Therefore, plaintiff has failed to prove its false advertising claim under the Lanham Act.

For the above reasons, I find that the statement

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

in the Stouffer advertisements at issue that the Lean Cuisine entrees fit into the Weight Watchers program is not false. The 1989 ad constitutes false advertising only insofar as the exchange information does not include optional calories for certain entrees containing optional calorie ingredients, and Stouffer therefore is enjoined from running advertisements that do not contain optional calorie information. Because the 1989 ad includes listings for such foods as optional meats, cheese and tomato puree, which were not included in the previous advertisements, and because the 1989 ad has modified the exchange information in the 1987 and 1988 ads, I infer that Stouffer would not revert to any such omissions and alleged errors that appeared in the 1987 and 1988 ads, and therefore it is unnecessary to fashion a remedy with respect to such omissions and alleged errors.^{FN13}

FN13. As set forth below in Section VI, Stouffer is enjoined from publishing the 1987 and 1988 ads insofar as their copy infringes plaintiff's trademark. That injunction is independent of any issue relating to their exchange content.

IV.

Plaintiff asserts three claims under New York law. For the reasons set forth below, it has failed to prove any of them.

A. *Unfair Competition*

[13] Plaintiff asserts that defendants' advertisements and promotional material violated the common law of unfair competition because they misappropriated plaintiff's mark and used it to misrepresent the source of defendants' goods. Although plaintiff uses the phrase "palming off" (Pl. Pre-Trial Mem. at 25), this case does not involve one party's attempt to pass off its goods as those of another, which until recently was the only basis upon which a party could base an unfair competition claim. See *American Footwear Corp. v. General Footwear Corp.*, 609 F.2d 655, 662 (2d Cir.1979), cert. denied, 445 U.S. 951, 100 S.Ct. 1601, 63 L.Ed.2d 787 (1980). Now, however, un-

fair competition encompasses "a broader range of unfair practices which may be generally described as a misappropriation of the skill, expenditures, and labor of another." *American Footwear*, 609 F.2d at 662. This includes misappropriating the goodwill of another company by misleading the public as to sponsorship or endorsement, as well as explicitly misrepresenting the source of the product.^{FN14} See *Ideal Toy Corp. v. Kenner Products Div. of General Mills Fun Group, Inc.*, 443 F.Supp. 291, 305-09 (S.D.N.Y.1977). Because I have found with regard to the Lanham Act claim that plaintiff has not proved likelihood of confusion in connection with the 1989 ad, either as to the source of the goods advertised or sponsorship, plaintiff's unfair competition claim fails as to the 1989 ad.

FN14. In New York unfair competition cases, courts have placed emphasis also on the existence of secondary meaning in the mark and/or defendant's predatory intent. See *American Footwear*, 609 F.2d at 662. As discussed above, there is substantial secondary meaning in the Weight Watchers mark, but Stouffer's conduct does not reflect predatory intent.

It is unnecessary to determine whether Stouffer's actions in connection with the 1987 and 1988 ads, which infringed plaintiff's trademark because of the likelihood that they would confuse consumers as to source or endorsement, also constitute common law unfair competition. Common law unfair competition claims closely parallel Lanham Act unfair competition claims; to the extent that they may be different, the state law claim may require an additional element of bad faith or intent. See *Saratoga*1284 Vichy Spring Co., Inc. v. Lehman*, 625 F.2d 1037, 1044 (2d Cir.1980). As discussed below, the only remedy to which plaintiff is entitled here is an injunction, and Stouffer already is enjoined from publishing these ads based on federal law. To the extent that this injunction may be found improper, an injunction based on state law also would be improper. Therefore, it is unneces-

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

sary to reach this state law claim as to the 1987 and 1988 ads.

B. Dilution

[14] Plaintiff claims also that Stouffer's use of the Weight Watchers trademark violated New York's anti-dilution statute, N.Y.Gen.Bus.Law § 368-d, which provides:

"Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark or trade name shall be a ground for injunctive relief in cases of infringement of a mark registered or not registered or in cases of unfair competition, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services."

The New York Court of Appeals has explained that the

"evil which the Legislature sought to remedy was not public confusion caused by similar products or services sold by competitors, but a cancer-like growth of dissimilar products or services which feeds upon the business reputation of an established distinctive trademark or name.

Allied Maintenance Corp. v. Allied Mechanical Trades, Inc., 42 N.Y.2d 538, 544, 399 N.Y.S.2d 628, 369 N.E.2d 1162 (1977). Thus, this statute protects companies' distinctive marks from the blurring or dilution that results when the mark is used on dissimilar, non-competing products. The statute would protect against such diluting uses as "Dupont shoes, Buick aspirin tablets, Schlitz varnish, Kodak pianos, [and] Bulova gowns." 1954 N.Y.Legis. Annual 49, *quoted in Sally Gee, Inc. v. Myra Hogan, Inc.*, 699 F.2d 621, 625 (2d Cir.1983). The statute was not meant, however, to extend to cases where the defendant is a direct competitor selling similar products. *See Business Trends Analysts v. Freedomia Group, Inc.*, 650 F.Supp. 1452, 1458 (S.D.N.Y.1987) (Weinfeld, J.); *Smithkline Beckman Corp. v. Proctor & Gamble Co.*, 591 F.Supp. 1229, 1246-47 (N.D.N.Y.1984), *aff'd mem.*, 755 F.2d 914 (2d Cir.1985); *Aris-Isotoner Gloves, Inc. v. Fownes*

Bros. & Co., Inc., 594 F.Supp. 15, 24 (S.D.N.Y.1983). *But see Sage Realty Corp. v. Sage Group, Inc.*, 711 F.Supp. 134, 142 (S.D.N.Y.1989); *Lesportsac, Inc. v. K Mart Corp.*, 617 F.Supp. 316, 317 (E.D.N.Y.1985); *Vitabiotics, Ltd. v. Krupka*, 606 F.Supp. 779, 784-85 (E.D.N.Y.1984).

Because Stouffer and Weight Watchers compete directly in the frozen food market with strikingly similar products, plaintiff lacks standing to sue under N.Y.Gen.Bus.Law § 368-d. Accordingly, this claim is dismissed.

C. Deceptive Trade Practices

[15] Plaintiff claims that by creating the impression through their ads that Weight Watchers sponsored Stouffer products, or that Weight Watchers calculated the exchanges listed in the ads, defendants engaged in deceptive acts and practices under N.Y.Gen.Bus.Law § 349.^{FN15} This statute provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." N.Y.Gen.Bus.Law § 349(a). The law empowers the attorney general to sue companies on behalf of the state, but also allows any person "who has been injured by reason of any violation of this section" to sue to enjoin the unlawful act or practice, and to recover the greater of actual damages or 50 dollars. N.Y.Gen.Bus.Law § 349(h).

FN15. Another section of the consumer protection statute, N.Y.Gen.Bus.Law § 350 and § 350-d prohibit false advertising. Plaintiff did not assert a claim under these sections.

Defendants argue that as a competitor and not a consumer, plaintiff does not have standing to sue under § 349. It is true, as Judge Weinfeld noted in *Genesco Entertainment*1285 v. Koch*, 593 F.Supp. 743, 751 (S.D.N.Y.1984), that "Section 349 wears its purpose on its face; it is entitled 'Consumer Protection From Unfair Acts and Practices.' " However, *Genesco* did not hold that standing should be limited to consumers. In finding that

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

private transactions without ramifications for the public at large were not a proper basis for suit under this section, Judge Weinfeld focused upon the public nature of the claim, rather than the status of the plaintiff. *Construction Technology, Inc. v. Lockformer Co., Inc.*, 704 F.Supp. 1212, 1222 (S.D.N.Y.1989). Therefore, competitors may have standing to sue, so long as some harm to the public at large is at issue. "While the statute does not preclude an action by one business against another, the gravamen of the complaint must be consumer injury or harm to the public interest." *AZBY Brokerage, Inc. v. Allstate Ins. Co.*, 681 F.Supp. 1084, 1089 n. 6 (S.D.N.Y.1988).

Here, the false advertising involving diet and food that Stouffer allegedly conducted clearly would involve a public harm if proved. Yet, although Weight Watchers may bring this claim, it cannot satisfy the necessary elements to prevail. Section 349(h) provides that a private party may bring a claim if it has been "injured by reason of any violation of this section." Although Weight Watchers has shown that the advertisements were misleading, it has failed to show either that Stouffer profited from these ads, or that plaintiff was damaged. Therefore, plaintiff has not proved its claim under the consumer protection statute.

V.

Stouffer asserts two main counterclaims: (1) Weight Watchers has misused its trademark to prevent competition and has engaged in other unfair acts in violation of the Lanham Act, Ohio law, and N.Y.Gen.Bus.Law § 349; and (2) Weight Watchers has engaged in false advertising under § 43(a) of the Lanham Act and injurious falsehood under the common law by misrepresenting the uniqueness of its food plan and disparaging Stouffer's Lean Cuisine to Weight Watchers members. These counterclaims—from the claim that Weight Watchers would not allow Stouffer to advertise in Weight Watchers Magazine to the contention that Weight Watchers is deceitful when it "guarantees" its products^{FN16}—boil down to the same underlying

contention: Weight Watchers uses its influence over its members to sell its branded products and to steer its members away from competitors' products. That Weight Watchers actually employs this marketing strategy reveals only that Weight Watchers—and more specifically, its parent company, Heinz—is interested in the bottom line just like any other company. Its tactics, though opportunistic, do not qualify as deceptive, unfairly predatory, or monopolistic. Most important, if Stouffer can make non-deceptive statements in advertising about its products' fit into the Weight Watchers program, then Weight Watchers can refute these statements in the marketplace if it also does so in a non-deceptive manner. Weight Watchers' ability to influence its members should not be held against the company to burden this right.

FN16. Stouffer's counterclaim that Weight Watchers has unfairly precluded fair use of the term "Weight Watchers" need not be addressed because this opinion allows Stouffer to use the phrase "Weight Watchers" in a non-confusing manner.

[16] First, defendant claims that Foodways' Weight Watchers brand frozen entree packages constitute false advertising, because the exchange information on the packages is not necessarily accurate, and the statement on the packages that the entrees fit the Weight Watchers program is intentionally misleading. Yet, the only representation Foodways makes on these packages, besides listing the exchanges, is that "This product was prepared to fit the Weight Watchers Program and is useful for weight control when used strictly in accordance with the Weight Watchers food plan." (DX JG) It not only is silly for Stouffer to try to prevent Weight Watchers from making this benign statement, but it is also impossible in view of the finding sought by Stouffer and discussed extensively *1286 above that even Lean Cuisine could "fit into" the Weight Watchers program.

[17] Second, Stouffer grounds claims of unfair competition and injurious falsehood on let-

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

ters—specifically one signed by Berger—sent by Weight Watchers to franchisees and members alerting them to the Lean Cuisine ads. Stouffer describes these letters as false and misleading, but Weight Watchers' statement to members that it can "stand behind" only its own products is not explicitly false, because in fact Weight Watchers does not have a duty to analyze other companies' products.

The thrust of the letters at issue was to emphasize Weight Watchers' policy for responding to members' concerns about processed diet foods made by other companies: "Weight Watchers does not stand behind the information statement on any brand of food except its own. We do not dispute or confirm the accuracy of any statement by any other manufacturer. Therefore, when it comes to these products, the member must use her/his own judgment." (DX BC)

Although Stouffer argues that the statement is false on its face because Weight Watchers exchanges are not in fact accurate, Stouffer cannot have its (diet) cake and eat it too: if it wants to argue that all exchanges are approximate and that the exchanges it has calculated fit into the Weight Watchers program, it cannot turn around and accuse Weight Watchers of calculating inaccurate exchanges when the alleged inaccuracies are no greater than its own. Further, Stouffer alleges that this statement *implies* that only Weight Watchers creates accurate or correct exchanges for its diet program, and thus uses its mark to certify exchange information or food and prevent the competition from using the exchange system. (Tr. 1349–53) Stouffer presents no evidence that consumers interpret the statement as implying that only Weight Watchers exchanges are correct, and therefore has not proved false advertising as to that statement. *Coca-Cola*, 690 F.2d at 317.

The Berger letter's criticisms of the exchanges listed in the 1988 ad—such as the absence of optional calories and certain limited vegetable exchanges—are not materially false, as these disparit-

ies did exist in the exchanges Stouffer listed. Berger did not say that Lean Cuisine could not "fit into" the Weight Watchers program; he wrote instead that Stouffer incorrectly represented the "Weight Watchers Exchanges" by failing to include certain exchanges. He wrote this letter before Stouffer changed its ad to list limited meat selections, semisoft/hard cheese and tomato puree. As discussed above, the absence of optional calorie calculations renders these exchanges at least partially false. It therefore was not misleading for plaintiff to tell its members that the Stouffer ad incorrectly represented Weight Watchers exchanges.

Stouffer also has not proved that Weight Watchers committed the common law tort of injurious falsehood. A defendant commits "injurious falsehood" when it publishes a false statement harmful to the pecuniary interests of plaintiff, with intent to deceive and with knowledge of the statement's falsity or with reckless disregard for the truth of the statement. *Restatement (Second) of Torts* § 623(A). There is no evidence here that Berger or Weight Watchers made a false statement about the Stouffer advertisements with an intent to deceive.

[18] Stouffer alleges also that, in effect, Weight Watchers has deceived its members and the United States Postal Service by representing itself as a service organization dedicated to the health and well-being of its members when in fact its real purpose is to make money for Heinz. It has submitted evidence that *Weight Watchers Magazine*, which is published by Weight Watchers TwentyFirst Corp., refused to accept advertisements for Lean Cuisine frozen entrees, and argues that this refusal is unfair and violates postal regulations conferring second class rates on materials published "for the purpose of disseminating information of a public character, or devoted to literature, the sciences, art or some other special industry." 39 CFR Pt. 3001, Subpt. C, App. A.

*1287 This claim is not convincing. It is not unusual for a company that markets a product and

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

owns a magazine to reject a competitor's ads. *See, e.g., Twin Laboratories, Inc. v. Weider Health & Fitness*, 720 F.Supp. 31 (S.D.N.Y.1989), *aff'd*, 900 F.2d 566 (2d Cir.1990). Stouffer has not explained how the magazine's rejection of the ads constitutes unfair competition. Stouffer's sales figures demonstrate that the magazine is not essential to Stouffer's ability to compete. Whether or not Weight Watchers is abusing its second class mailing privileges does not relate to an unfair competition claim, and should be dealt with by the Postal Service and not by this court.

[19] Finally, Stouffer asserts numerous affirmative defenses, including laches and estoppel and acquiescence. As to the laches, estoppel and acquiescence claims, Stouffer argues that plaintiff did not complain or take any action with regard to the ads for a long time, and that Stouffer in fact had been publishing "Weight Watchers Exchanges" since 1981. Stouffer claims that plaintiff's delay harmed Stouffer because it expanded and developed its advertising program thinking there was no opposition. (Def.Mem. at 22) To prove a laches defense in a trademark case, defendant must show that "plaintiff had knowledge of defendant's use of its marks, that plaintiff inexcusably delayed in taking action with respect thereto, and that defendant will be prejudiced by permitting plaintiff inequitably to assert its rights at this time." *See Cuban Cigar Brands N.V. v. Upmann International, Inc.*, 457 F.Supp. 1090, 1096 (S.D.N.Y.1978) (Weinfeld, J.), *aff'd mem.*, 607 F.2d 995 (2d Cir.1979). That defendant continued to spend money on advertising which exploited the Weight Watchers mark is not prejudicial reliance. Defendant has offered no evidence that it was harmed more than it was helped by Weight Watcher's insignificant delay in bringing this action. Therefore, it cannot prevail on its laches defense.

Further, plaintiff's prior knowledge that Stouffer had been providing Weight Watchers exchanges to consumers who sent away for them does not bar it from suing on the advertisements. The po-

tential impact of the advertisements obviously was much greater than the impact of pamphlets sent in response to individual requests; plaintiff's judgment that the publications available by mail were not worth the hassle of a lawsuit does not constitute estoppel or acquiescence.

For the above reasons, defendant's counterclaims and affirmative defenses are dismissed.

VI.

[20] Plaintiff requests both injunctive and monetary relief; it asks for a broad injunction against any use of the Weight Watchers mark in connection with any dietary exchange information, and against representing that defendants' products are equivalent to or fit into or are interchangeable with Weight Watchers exchanges or diet program. It asks also for a judgment ordering defendants to destroy all infringing advertising material, to account for and pay all profits from the allegedly infringing acts and to pay costs and attorneys' fees. I have found trademark infringement only as to the first two advertisements, on the basis of these advertisements' confusing use of the mark "Weight Watchers." Further, I have found false advertising in the 1989 ad only as to certain exchange information, and not as to claims of "fit" in the ad copy. Accordingly there is no basis to enjoin defendants from ever using the "Weight Watchers" mark, nor from stating that Stouffer's Lean Cuisine products fit into the Weight Watchers program, for reasons discussed extensively in this opinion. As discussed above, Weight Watchers is entitled only to the limited remedy of an injunction against Stouffer ads that do not include optional calories in the exchange data.

Defendants are enjoined, however, from publishing the 1987 and 1988 advertisements. Under the Lanham Act, the issuance of an injunction requires neither demonstration of actual consumer confusion stemming from the infringement, nor actual injury to plaintiff. *Vuitton et Fils, S.A. v. Crown Handbags*, 492 F.Supp. *1288 1071, 1077 (S.D.N.Y.1979), *aff'd mem.*, 622 F.2d 577 (2d Cir.1980). The mere likelihood of such injury is

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

sufficient to warrant an injunction. *Monsanto Chemical Co. v. Perfect Fit Mfg. Co., Inc.*, 349 F.2d 389, 392 (2d Cir.1965), *cert. denied*, 383 U.S. 942, 86 S.Ct. 1195, 16 L.Ed.2d 206 (1966), *quoted in Vuitton et Fils*, 492 F.Supp. at 1077. As discussed at length above, the two earlier advertisements use the "Weight Watchers" mark in a potentially confusing manner, and are misleading because of their errors in accurately presenting the dietary exchanges for Lean Cuisine entrees.

Although this constitutes a finding of likelihood of confusion, it is important to consider the well-settled doctrine that the "grant of injunctive relief depends upon whether such relief is necessary as a matter of equity to relieve against threatened further violations." *Menendez v. Saks and Co.*, 485 F.2d 1355, 1375 (2d Cir.1973), *rev'd on other grounds*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). Thus, a permanent injunction is proper only when there is a likelihood not only that consumers could have been misled in the past, but that consumers will be misled in the future. *See Burndy Corp. v. Teledyne Industries, Inc.*, 748 F.2d 767, 772 (2d Cir.1984). That these ads were published two years ago, and have been replaced by a non-deceptive, non-infringing advertisement would suggest that defendants do not intend to publish these ads in the future, and that injunctive relief is therefore unnecessary. Nonetheless, defendants have not promised to refrain from publishing the infringing 1987 and 1988 ads, or any substantially similar ad FN17; indeed, their position throughout this suit has been that the ads were not infringing or misleading. There is thus a small possibility of future harm, and plaintiffs are entitled to an injunction prohibiting publication of the two infringing advertisements. *See, e.g., National Geographic Society v. Conde Nast Publications, Inc.*, 687 F.Supp. 106, 110 (S.D.N.Y.1988).

FN17. A substantially similar infringing ad would be one using the same or a similarly worded headline, but substituting the current number of Lean Cuisine entrees on the

market.

Plaintiff asks also for an accounting and payment of any profits to defendants from their infringing acts. Such relief is denied, because as discussed below, the circumstances of this case do not merit an accounting under 15 U.S.C. § 1117(a). Further, plaintiff has not adequately shown actual confusion—and thus actual damages—caused by the first two advertisements. Consequently, the only remedy for trademark infringement and false advertising in the 1987 and 1988 advertisements will be injunctive.

Section 1117(a) of the Lanham Act governs damage awards for infringement of a registered trademark. It provides, in part, that when a violation has been shown,

"plaintiff shall be entitled ... subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party."

15 U.S.C. § 1117(a).

A defendant's infringement of plaintiff's trade-

744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as: 744 F.Supp. 1259)

mark does not automatically entitle plaintiff to an accounting. *Cuisinarts*, 580 F.Supp. at 636 (citing *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125, 67 S.Ct. *1289 1136, 91 L.Ed. 1386 (1947)). Rather, an accounting is appropriate if defendant "is unjustly enriched, if the plaintiff sustained damages from the infringement, or if an accounting is necessary to deter a willful infringer from doing so again." *W.E. Bassett Co. v. Revlon, Inc.*, 435 F.2d 656, 664 (2d Cir.1970). Here, plaintiff did not present evidence that it sustained damages from the publication of the infringing ads, as plaintiff's survey evidence of actual consumer confusion was substantially flawed. Further, plaintiff presented no evidence of actual money damages sustained.

The only other bases for granting an accounting, therefore, would be defendants' unjust enrichment or bad faith. Stouffer would have been unjustly enriched if its sales of Lean Cuisine items were attributable to its infringing use of the Weight Watchers name in its 1987 and 1988 ads. See *Bassett*, 435 F.2d at 664. The burden of proving the amount attributable to defendants' wrongful conduct falls on plaintiff, who must "demonstrate the basis for his recovery with specificity." *Vuitton et Fils*, 492 F.Supp. at 1077. See *Burndy Corp.*, 748 F.2d at 772. Although it is possible that consumers bought Lean Cuisine entrees solely because they were misled by the ads into thinking that Weight Watchers endorsed these food items, plaintiff has introduced no evidence of such sales, and has not proved unjust enrichment. Nor do I find that defendants deliberately violated the law when they published the ads at issue. "An accounting for profits is not appropriate where the infringer, while in a judge's eyes having violated the statute, nonetheless acted in good faith." *Cuisinarts*, 580 F.Supp. at 640.

Finally, plaintiff cannot recover attorneys' fees, which under § 1117 of the Lanham Act a court may award only in "exceptional cases." Exceptional cases are those where acts of infringement "can be characterized as 'malicious,' 'fraudulent,'

'deliberate,' or 'willful.' " Sen.Rep. No. 93-1400, 93rd Cong., 2d Sess. (1974), reprinted in (1974) U.S.Code Cong. and Admin.News pp. 7132, 7135, quoted in *Vuitton et Fils*, 492 F.Supp. at 1078. This is not such a case.

* * *

For the above reasons, plaintiff proved at trial that defendant infringed its registered trademark in advertisements it published in 1987 and 1988. Plaintiff failed to prove that defendant violated trademark laws in connection with the most recent ad at issue in this case, published in 1989. Because the first two ads were misleading, plaintiff also prevails on its false advertising claim as to these ads. But plaintiff failed to prove that the statement in the advertisements claiming that Lean Cuisine entrees fit into the Weight Watchers program is false, and failed to prove that the combination of listing ADA exchanges on Lean Cuisine boxes and Weight Watchers exchanges in the ad was misleading. Plaintiff did prove that exchanges given for some of the Lean Cuisine entrees in the advertisements, including the 1989 ad, were not accurate. Plaintiff failed to prove any of its state law claims.

Defendants failed to prove any of their counter-claims.

The above shall constitute my findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a). The injunctive remedies discussed elsewhere in this opinion will be applied. The parties will submit a mutually satisfactory judgment within 10 days, failing which either party may settle a judgment on 10 days notice.

SO ORDERED.

S.D.N.Y., 1990.

Weight Watchers Intern., Inc. v. Stouffer Corp.
744 F.Supp. 1259, 19 U.S.P.Q.2d 1321

END OF DOCUMENT

Opposition Nos. 91194974 (Parent) and 91196358
PROMARK BRANDS INC. & H.J. HEINZ COMPANY v. GFA BRANDS, INC.
Offered by Opposers ProMark Brands Inc. & H.J. Heinz Company

Westlaw.

19 U.S.P.Q.2d 1321
744 F.Supp. 1259, 19 U.S.P.Q.2d 1321
(Cite as:19 U.S.P.Q.2d 1321)

Page 1

▷

Weight Watchers International Inc.
v.
The Stouffer Corp.

District Court, S.D. New York
No. 88 Civ. 7062 (MBM)

Decided August 30, 1990

Amended October 12, 1990

United States Patents Quarterly Headnotes

TRADEMARKS AND UNFAIR TRADE PRACTICES

[1] Types of marks - Secondary meaning (§ 327.02)
Types of marks - Suggestive - Particular marks (§ 327.0403)

"Weight Watchers," for diet and food products, is suggestive rather than descriptive, and has acquired secondary meaning.

TRADEMARKS AND UNFAIR TRADE PRACTICES

[2] Unfair and false advertising - Comparative advertising (§ 390.03)

Defendant's intent in using plaintiff's "Weight Watchers" trademark in its "compatibility" advertisement does not weigh in favor of plaintiff, in determining likelihood of confusion, since, unlike instances of purposeful copying, compatibility ads are meant to convey product information useful to consumers.

TRADEMARKS AND UNFAIR TRADE PRACTICES

[3] Infringement; conflicts between marks - likelihood of confusion - Evidence of - Survey evidence (§ 335.0303.06)

Criteria for trustworthiness of survey evidence are that "universe" was properly defined, that representative sampling of such universe was selected, that questions were framed in clear, precise, and non-leading manner, that sound interview proced-

ures were followed by competent interviewers who had no knowledge of survey's purpose, that data gathered was reported accurately and was analyzed in accordance with accepted statistical principles, and that objectivity of process was assured.

TRADEMARKS AND UNFAIR TRADE PRACTICES

[4] Unfair and false advertising - Comparative advertising (§ 390.03)

Non-monetary and injunctive - Equitable relief - Disclaimer (§ 505.0711)

Disclaimer which appears in minuscule print at very bottom of advertisement does not, in view of its location and size, effectively eliminate misleading impression conveyed by ad's large headline.

TRADEMARKS AND UNFAIR TRADE PRACTICES

[5] Infringement; conflicts between marks - Passing off (§ 335.07)

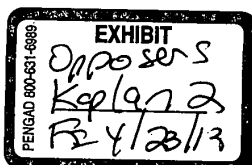
Unfair and false advertising - Comparative advertising (§ 390.03)

Advertisements for defendant's "Lean Cuisine" low calorie food products which, through their use of plaintiff's "Weight Watchers" mark, create confusion as to source and endorsement, infringe plaintiff's mark, but defendant cannot be precluded from using plaintiff's mark to show how its products fit into "Weight Watchers" program, since such restriction would unduly discourage companies from advertising their products' compatibility with other companies' services or products and would circumscribe commercial expression.

TRADEMARKS AND UNFAIR TRADE PRACTICES

[6] Unfair and false advertising - Lanham Act Section 43(a) (§ 390.05)

Statement, in advertisement for defendant's "Lean Cuisine" food products, that defendant's products "fit" into plaintiff's "Weight Watchers" food program is not false, even though there may be minor discrepancies in way parties count food exchanges



of certain frozen meals; defendant, in order to avoid being misleading when advertising exchanges "to fit into your Weight Watchers program," must apply all elements of plaintiff's system as made available to plaintiff's members, and calculate exchanges under plaintiff's system as accurately as would scrupulous adherent of plaintiff's system.

TRADEMARKS AND UNFAIR TRADE PRACTICES

[7] Infringement; conflicts between marks - Dilution (§ 335.05)

New York's anti-dilution statute, N.Y. Gen. Bus. Law 368-d, protects against blurring or dilution caused by mark's use on dissimilar, non-competing products, and does not extend to use of mark by direct competitor selling similar product.

TRADEMARKS AND UNFAIR TRADE PRACTICES

[8] Unfair competition - State and common law (§ 395.03)

Competitor may have standing to sue under New York's consumer protection statute, N.Y. Gen. Bus. Law 349, if competitor can demonstrate that some harm to public is at issue; defendant's alleged false advertising involving diet and food products clearly would, if proved, involve public harm, but plaintiff's failure to show either that defendant profited from such ads, or that plaintiff was damaged by ads, precludes its recovery under statute.

TRADEMARKS AND UNFAIR TRADE PRACTICES

[9] Infringement; conflicts between marks - Defenses - Laches or limitations period (§ 335.1005)

Trademark infringement defendant's assertion that it continued to spend money on advertising which exploited plaintiff's "Weight Watchers" mark is insufficient to demonstrate its prejudicial reliance and to show that it was harmed by plaintiff's insignificant delay in bringing infringement action.

REMEDIES

[10] Non-monetary and injunctive - Equitable relief - Permanent injunctions - Trademarks and unfair

trade practices (§ 505.0709.09)

Issuance of injunction under Lanham Act requires neither demonstration of actual consumer confusion stemming from infringement, nor actual injury to plaintiff; rather, mere likelihood of such injury is sufficient to warrant injunction, although permanent injunction requires showing of likelihood that consumers will be misled in future, as well as likelihood that they were misled in past.

REMEDIES

[11] Monetary - Damages - Accounting (§ 510.0502)

Defendant's infringement of plaintiff's mark does not automatically entitle plaintiff to accounting, which is appropriate only if defendant is unjustly enriched, if plaintiff sustained damages from infringement, or if necessary to deter willful infringer from doing so again.

Action by Weight Watchers International Inc. against The Stouffer Corp., Stouffer Foods Corp., and Nestle Enterprises, for trademark infringement, false advertising, unfair competition, dilution, and deceptive trade practices, in which Stouffer Foods Corp. counterclaims against Weight Watchers International Inc., H.J. Heinz Co., and Foodways National Inc., for deceptive and unfair trade practices, false advertising, unfair competition, intentional interference with sale, and injurious falsehood. Judgment for plaintiff in part.

Prior decision: 11 USPQ2d 1544.

William R. Hansen, Bert A. Collison, and Ronald J. McGaw of Nims, Howes, Collison & Isner, New York, N.Y.; Robert J. Hollweg, Jericho, N.Y., for Weight Watchers International.

Robert V. Vickers, of Body, Vickers & Daniels, Cleveland, Ohio; Mary Lee Pilla, Nestle Enterprises, Inc., Solon, Ohio; Paul Fields and Ira J. Levy, of Darby & Darby, New York, for defendants.

Mukasey, J.

Whether or not the late Duchess of Windsor was right when she postulated that one can never be too rich or too thin, ^{FN1} one certainly can get rich these days by holding out the promise to make others thin. The parties to this action hold out that promise, and clash in pursuit of those riches.

Plaintiff Weight Watchers International, Inc. markets both a diet program and a line of frozen low calorie foods. Plaintiff's diet program, as set forth in greater detail below, employs a system of six food groups (bread, fruit, protein, fat, milk and vegetable) in specified quantities, called exchanges. Defendant Stouffer Foods Corporation manufactures and markets a line of low calorie frozen foods under the name "Lean Cuisine." Beginning in 1987, Stouffer launched an advertising campaign aimed primarily at those who follow the Weight Watchers program. The ads listed what were said to be Weight Watchers exchanges for Stouffer's Lean Cuisine entrees that would enable Weight Watchers adherents to use Lean Cuisine entrees in their Weight Watchers diets. In communications to those who followed its diet program, Weight Watchers disputed the accuracy of the Lean Cuisine ad campaign. This lawsuit followed, with Weight Watchers asserting trademark infringement and both sides leveling charges of deception and unfair trade practices.

Because the Stouffer ads in question were misleading or inaccurate in certain limited respects, they are enjoined for the reasons and to the extent described below, although Stouffer certainly will be able to use the Weight Watchers name in accurate, non-confusing compatibility advertising. The Stouffer claims against Weight Watchers are without substance and are dismissed.

Weight Watchers filed this suit in October, 1988 against The Stouffer Corporation, and later amended the complaint to include as defendants Nestle Enterprises, Inc. and Stouffer Foods Corporation. Plaintiff alleges trademark infringement, false advertising *1323 and unfair competition in violation of the Lanham Act, and state law claims

of unfair competition, dilution and deceptive trade practices arising out of an advertising campaign for Stouffer Food Corporation's Lean Cuisine line of frozen entrees, including ads in 1987, 1988 and 1989. Plaintiff seeks an injunction prohibiting defendants from using the mark "Weight Watchers" in connection with any diet-related exchange information, or from stating or implying that defendants' products fit into or are interchangeable with plaintiff's diet program or exchanges. Plaintiff seeks the profits defendants earned from the advertising at issue as well as costs of suit.

Defendant Stouffer Foods Corporation filed counterclaims against Weight Watchers, H.J. Heinz Company and Foodways National, Inc., alleging deceptive and unfair trade practices and false advertising in violation of the Lanham Act, as well as state law claims of unfair competition, intentional interference with sale and injurious falsehood. Counterclaim-plaintiff asks for compensatory and punitive damages against counterclaim-defendants, as well as declaratory relief and costs.

From February 26, 1990 to March 7, 1990 the parties tried the case to the court. This opinion contains the findings and conclusions from the evidence at that trial.

I.

A. The Parties

Weight Watchers International is a corporation organized under the laws of Virginia, with its principal place of business in Jericho, New York. (Compl. P2) Weight Watchers was founded in 1963 by Jean Nidetch, a woman who resolved to lose weight but was unable to do so until she discovered that group support for her weight loss efforts provided the needed catalyst for shedding pounds. She met with a group of overweight friends in her living room in Little Neck, Long Island, and they were so successful at losing weight that soon Nidetch was leading

groups in her neighborhood. The groups became a business, and over the next 15 years the business expanded across the globe; by 1978, Weight Watchers had franchises all over the world and 500,000 members per week attending meetings world-wide. (Tr. 31-32)

In 1978, the H.J. Heinz Co. bought Weight Watchers (Tr. 32); four months earlier, Heinz had acquired Foodways National, Inc., a licensee of Weight Watchers which produced frozen foods under the Weight Watchers brand name. (Tr. 56-60) Weight Watchers receives a licensing fee from the sale of Weight Watchers brand frozen food based upon a percentage of sales. (Tr. 97) Foodways is not the only Weight Watchers licensee; other companies - particularly Heinz USA, another subsidiary of H.J. Heinz Co. - produce Weight Watchers brand products such as yogurt, salad dressing, condiments and mixes. (Tr. 104)

Sales of Weight Watchers brand frozen entrees manufactured by Foodways rose from \$90 million in fiscal 1982 to over \$300 million in fiscal 1989. (PX 66) Also by 1989, sales of the Weight Watchers diet program topped \$230 million (Tr. 33), with membership averaging over 600,000 people per week in the United States. (Tr. 33)

Weight Watchers International, H.J. Heinz Co. and Foodways National are all counterclaim-defendants in this case.

Named defendants The Stouffer Corporation (TSC) and Nestle Enterprises, Inc. (NEI) are Ohio corporations with their principal places of business in Solon, Ohio. Defendant and counterclaimant-plaintiff Stouffer Foods Corporation is a Pennsylvania corporation with its principal place of business in Solon, Ohio. TSC owns the registered trademarks "Lean Cuisine" and "Stouffer's." (Tr. 1357)

Stouffer Foods has manufactured and marketed food products since 1946, but it did not introduce the line of frozen entrees at issue here, called Lean Cuisine, until 1981. (PX 66, Tr. 371) By 1982,

Lean Cuisine surpassed Weight Watchers frozen entrees in total sales, and by 1983 was selling over twice the volume of the Weight Watchers brand. (PX 66) According to a chart introduced by Weight Watchers, Lean Cuisine's sales started dropping in 1985, and in 1988 were even with Weight Watchers' sales. (PX 66) Since then, Weight Watchers and Stouffer have been competing closely and ferociously for market share.

Defendants assert that this court lacks personal jurisdiction over TSC and NEI. (Answer PP53-57) Plaintiff tries to connect NEI with this case on the basis of Nestle Enterprises' ownership of Stouffer and Stouffer Food Corporation, and the alleged involvement of Nestle Chairman James Biggar in approving the Stouffer Foods Corporation advertisement at issue. Because there is no clear legally cognizable evidence that Biggar approved any of the ads at issue, and there is no other evidence of other connections between NEI and this case, plaintiff's *1324 claims against Nestle Enterprises are dismissed.

The Stouffer Corporation is more closely tied with Stouffer Foods Corporation, and there is clear evidence that by the middle of 1988, management at TSC knew about Weight Watchers' displeasure with the ads at issue and Weight Watchers' objections to the use of exchange information in these ads, and that they negotiated this dispute with Weight Watchers management. (Tr. 1186) In letters to Weight Watchers' Director of Legal Affairs, TSC's Senior Vice President and General Counsel and Secretary, James Ball, described the history of the Lean Cuisine ad campaign targeted toward Weight Watchers members, discussed exchange information, showed an in-depth knowledge of the ads at issue here, and pointed out Weight Watchers' own shortcomings. (PX 64A, 64B) These letters were written well before the 1989 advertisement was published, and thus indicate that TSC at the very least knew about the advertisements and probably was directly involved in the publishing of such ads. Therefore, The Stouffer Corporation is not dis-

missed as a defendant in this lawsuit.

B. The Weight Watchers Program

The Weight Watchers weight loss program has four parts: the food plan, the exercise plan, the self-discovery plan and group support. (Tr. 194) The self-discovery plan teaches members to recognize the situations which trigger overeating and to modify their behavior; group support, as the name suggests, provides encouragement from others for each member's weight loss efforts. (PX 85) It is only the food plan, however, that is at issue in this case. Group leaders stress five keys to the food plan: daily totals and weekly limits on what members can eat; exchange lists, which allow members to choose certain amounts of food from each of six food groups; so-called "lifestyle options," which allow members to individualize the program; menu planners; and checklists which members must fill out to keep track of what they eat. (Tr. 197-98) These elements are interrelated and support the basic mandate of limiting food intake.

A food "exchange" is an approximation of the caloric value of foodstuffs in a given portion size. (Tr. 1108) The exchange element of the food plan is designed to ensure that members eat a well-balanced array of foods and consume them in proper amounts. The system of food exchanges largely obviates the need for counting calories, a process that has two drawbacks: first, it is difficult and often confusing for laypeople; second, if pursued without attention to the nutrient content of food, it can lead to an unbalanced and unhealthy diet. Instead, the exchange system assures that members consume the allotted number of food exchanges of the six designated food exchange categories.

In Week One of the Weight Watchers program, a new member receives a booklet containing six exchange lists. They are for fruits, vegetables, fats, protein, bread, and milk. Weight Watchers explains an exchange list as a group of foods with similar

caloric and nutrient content. (PX 86-A at 3) An exchange is one food item in the amount listed. Foods on the same exchange list may be selected interchangeably to fulfill that day's quota for that particular food group. (*Id.*) For example, in the first week, a woman must consume 2 to 3 fruit exchanges, at least 3 vegetable exchanges, 3 fat exchanges, 5 to 6 protein exchanges, 2 bread exchanges, and 2 milk exchanges per day.^{FN2} Amounts are somewhat different for men and teenagers. (*Id.* at 1)

In addition to the exchanges, members are allotted a certain number of "optional calories" each week - that is, an allowance of calories members can "spend" by eating certain foods over and above the exchanges allotted for each day or week. (See, e.g., PX 86-A at 3). During the first week of the program, a member may spend 150 optional calories on foods listed on "options lists" in the Weight Watchers booklets. These optional calorie foods include limited quantities of cocoa, honey, ketchup, jam, or extra amounts of foods listed under the exchanges. Each week for the next four weeks of the program, the exchange lists are expanded to include more food options and the optional calorie allowance is expanded to 500 calories.^{FN3}

***1325** The program also places weekly limits on specific foods which are high in calories, fats and cholesterol, such as eggs, hard or semi-soft cheese, beef, lamb or pork, and organ meats. (PX 86-A at 6) These foods fall under the "protein" exchange categories; when they are ingredients in Weight Watchers products, their presence is specially noted in parentheses so members know that they are consuming "limited exchanges." (DX JG) Further, although members are allowed unlimited vegetable exchanges, no more than one of these vegetable exchanges per day may be fulfilled by eating tomato products or juices. (PX 86-E at 5)

The concept of using food group "exchanges" in diet plans did not originate with Weight Watchers. Exchanges simplify a meal planning system by reducing calorie intake while at the same time provid-

ing easy values that a dieter can remember without having to count calories. (Tr. 1109) Dieticians for many years have used food exchanges in their work; a dietician, by examining a recipe and nutritional information for a commercial food product, can assign exchange values to the product to allow its use in a diet program. (Tr. 1111-12) The system of exchanges the dietician uses may vary depending upon the goal of the diet - that is, whether the diet is meant for weight loss or to limit certain foods for medical reasons. (Tr. 1108) But exchange values used in weight loss diets are similar, whether they are set by Weight Watchers or other dieticians. The American Dietetic and American Diabetic Associations (ADA) publishes exchange lists for foods, meant to be used by people with diabetes and people on weight loss programs; these exchange categories are quite similar to the ones used by Weight Watchers. (DX LK, LL, LM) The ADA has been using the exchange concept and providing exchange lists to nutritionists and dieticians for many years, and in fact used the term "exchange" before Weight Watchers did. (DX LK at 060438) Stouffer lists ADA exchanges for each Lean Cuisine entree on the product's box.

In 1984, Weight Watchers developed a new diet program called Quickstart, which was designed to help members lose weight faster by further reducing their calorie intake in the first few weeks. (Tr. 46-47) It was at this time that Weight Watchers formally adopted the system of "exchanges"; prior to that, it used other terms such as "servings." (Tr. 615) Stouffer alleges that one of the primary objectives of Weight Watchers' new food plan and its optional calories was to sell more Foodways frozen meals and to discourage members from buying competitors' frozen diet meals. Although there is no evidence that the new plan was meant to hinder competition, there is evidence that Weight Watchers changed the diet in response to Foodways' concern that in the first two weeks of that plan members could not eat most of Foodways' frozen meals. (DX ES, EQ)

When Weight Watchers first showed the plan to Foodways, Foodways strenuously objected to the new plan because of the short lead time Weight Watchers gave Foodways to change its products, and because the plan limited use of Foodways entrees; an intramural dispute between the two Heinz-owned companies ensued. (DX ES, EV) As a result, Weight Watchers changed the plan to include "optional calories." This system of optional calories allowed members to use almost all Weight Watchers brand products even at the beginning of the diet. (DX EQ, ES, ET, Tr. 122-128)

It is evident that since the Heinz takeover, the Weight Watchers program has been somewhat influenced by the interest of Heinz, including its subsidiaries, to sell low calorie products. Nevertheless, Stouffer's contention that this undisclosed influence constitutes misrepresentation by Weight Watchers is absurd. The primary goal of Weight Watchers is still to help its members lose weight, and Stouffer has presented no evidence to the contrary. Indeed, there is no evidence that Weight Watchers followed suggestions by Foodways to instruct Weight Watchers group leaders to push Weight Watchers frozen meals at group meetings (Tr. 131), although group leaders do hand out information and coupons for Weight Watchers food products at these meetings. (Tr. 131-32)

C. Frozen Food and the Weight Watchers Program

Each box of Weight Watchers brand frozen entrees lists the Weight Watchers exchanges for that entree. These exchanges are calculated by Weight Watchers' manager of license operations, Allen Ho. Ho also supervises Weight Watchers' quality control of Foodways and other licensees' products. (Tr. 620-622; 643-45) Ho testified at trial that he calculates exchanges in consultation with the nutrition department based upon published program information given to Weight Watchers members and leaders, and other "guidelines" - some in his head and some written down - that govern the calculation of

exchange values for ingredients used specifically *1326 in processed food, such as preservatives, flavorings and texturizing ingredients. (Tr. 622-624; 630-634) As discussed below, in Section III of this opinion, Ho's decisions, based on undisclosed criteria, seem in some instances to be arbitrary.

D. Stouffer's Advertisements

When Stouffer Food Corporation launched its Lean Cuisine product line in 1981, it began to offer by mail booklets listing ADA exchanges and Weight Watchers exchanges for Lean Cuisine entrees. (DX G, H, I, J, K; Tr. 803-804) In 1987, Stouffer attempted to schedule an advertisement in Weight Watchers magazine, but the magazine rejected the advertisement. (DX JK; Tr. 805-806) In June and September 1987, Stouffer ran an advertisement in *Parade* magazine with the headline "LEAN CUISINE ENTREES PRESENT 25 WAYS TO GET MORE SATISFACTION FROM YOUR WEIGHT WATCHERS PROGRAM," and a smaller headline: "WEIGHT WATCHERS EXCHANGES FOR LEAN CUISINE ENTREES." (PX 9; Tr. 807) Below these headlines, and taking up most of the space in the ad, were pictures of Lean Cuisine entree boxes for each of the 25 entrees. Under the picture of each box, Weight Watchers exchange information was listed. At the very bottom of the ad, in small print, Stouffer placed the disclaimer: "Weight Watchers is a registered trademark of Weight Watchers International, Inc. The exchanges provided here are based solely on published Weight Watchers exchange information and do not imply approval or endorsement of those exchanges or of LEAN CUISINE entrees by Weight Watchers International, Inc." A dotted line broken by the phrase "clip here" framed the perimeter of the advertisement. This configuration suggests the ad was meant to be cut out and affixed to a wall, bulletin board or perhaps by magnets to a refrigerator door, where it could be consulted in aid of selecting a Lean Cuisine frozen entree.

In June, 1987, Weight Watchers sent a "Flash Bulletin" to its North American franchisees alerting them to the claim that Lean Cuisine fits into the Weight Watchers program, and emphasizing that group leaders should respond to any questions about this ad by saying that "we only stand behind Weight Watchers products and any claims by other products cannot be substantiated. We do not dispute or confirm claims by other companies. Stouffer's Lean Cuisine remains a separate company with no affiliation to Weight Watchers." (DX BC) This statement echoes a section of the Weight Watchers guide for group leaders. (DX BC)

In January 1988, Stouffer ran a slightly different advertisement in *Parade* magazine. (Tr. 815) This one declared in different typeface: "Stouffer's presents Weight Watchers exchanges for all 28 Stouffer's Lean Cuisine entrees." (PX 10) As in the previous ad, the boxes were depicted with the Weight Watchers exchange information below each, and a dotted line framed the pictures of the boxes and most of the copy. The disclaimer in this advertisement, although slightly larger than in the previous ad, was printed below the line where consumers were supposed to cut out the advertisement.

Also in January, 1988, Stouffer conducted a direct mail campaign in which it sent a letter, a copy of the 1988 Lean Cuisine advertisement (PX 10) and a coupon to Weight Watchers members. (PX 11; DX BD)

In April, 1988, Charles Berger, the President and Chief Executive Officer of Weight Watchers, sent a letter to all Weight Watchers members describing the 1988 Lean Cuisine ad, and advising members that:

"First, we want you to know that Weight Watchers did not sponsor or otherwise cooperate in this advertisement.

Second, you should be advised that Stouffer's has incorrectly represented the 'Weight Watchers Exchanges.' In no instance has Optional Exchange Information been listed, although this is indicated by the ingredients stated on the package. Similarly, Fat

Exchange and Vegetable Exchange information is omitted in certain cases. Also, certain Limited Vegetable Exchanges and Protein Exchanges are not identified.

As you should be aware, Weight Watchers does not review or otherwise provide Exchange Information for commercially prepared branded food products such as Stouffer's Lean Cuisine entrees.

The only Exchange Information which we do provide and stand behind is that on Weight Watchers brand products. ..." (DX BT)

In February, 1989, after this litigation already had commenced, Stouffer ran a third advertisement; this one ran in newspapers and carried a coupon and the headline, "Stouffer's presents exchanges for all 35 Lean Cuisine items to fit into your Weight Watchers program." (PX 14, 15) The exchanges for these products again were listed under each picture, although these exchanges were more detailed, and included *1327 footnotes showing "limited meat" choices, semisoft/hard cheese and tomato paste/puree. The same disclaimer was printed, although in this ad it appeared inside the dotted line marking where to cut out the ad.

II.

Weight Watchers owns six registrations for its mark "Weight Watchers," which is used on and in connection with frozen food products, dry foods, a magazine, and as a service mark for the weight loss program discussed above. (PX 2-8)

Weight Watchers bases its trademark infringement and unfair competition claims on §§32 and 43(a) of the Lanham Act, and also brings a false advertising claim under §43(a) of the Act. 15 U.S.C. §§1114(1) and 1125(a). Because Weight Watchers has registered its "Weight Watchers" trademark, it may rely upon § 32(1)(a) of the Act, *see Cuisinarts, Inc. v. Robot-Coupe Intern. Corp.*, 509 F.Supp. 1036, 1041 [213 USPQ 551] (S.D.N.Y. 1981), which provides in pertinent part:

"(1) Any person who shall, without the consent of the registrant-

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; ... shall be liable in a civil action by the registrant for the remedies hereinafter provided...."

15 U.S.C. §1114(1). Section 43(a) of the Lanham Act makes actionable both false designation of origin and false advertising.^{FN4} 15 U.S.C. § 1125(a). The same facts which substantiate an action for trademark infringement under § 32 will support a claim for false designation of origin or sponsorship under § 43(a). *See Thompson Medical Co., Inc. v. Pfizer Inc.*, 753 F.2d 208, 213 [225 USPQ 124] (2d Cir. 1985); *Cuisinarts*, 509 F.Supp. at 1042.

A. Strength of the Mark

In analyzing whether plaintiff has proved trademark infringement or unfair competition under §43(a), it is helpful as a threshold matter to examine how much protection the mark at issue deserves.^{FN5} *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 871 [230 USPQ 831] (2d Cir. 1986).

"Weight Watchers" is a registered trademark. When a mark is registered under the trademark laws, the mark is "presumed to be distinctive and should be afforded the utmost protection." *Lois Sportswear*, 799 F.2d at 871 (citing *Vibrant Sales, Inc. v. New Body Boutique, Inc.*, 652 F.2d 299, 304 [211 USPQ 297] (2d Cir. 1981), *cert. denied*, 455 U.S. 909 [213 USPQ 1056] (1982)). Proof of secondary meaning is not required when a plaintiff brings a claim for infringement of a registered trademark. *Thompson Medical Co.*, 753 F.2d at 216 n.14.

B. Likelihood of Confusion

A trademark holder establishes a *prima facie* case of trademark infringement or unfair competition by demonstrating that the allegedly infringing use of its trademark is likely to confuse consumers as to the source of the product. *Home Box Office, Inc. v. Showtime/The Movie Channel, Inc.*, 832 F.2d 1311, 1314 [4 USPQ2d 1789] (2d Cir. 1987); *Mushroom Makers, Inc. v. R.G. Barry Corp.*, 580 F.2d 44, 47 [199 USPQ 65] (2d Cir. 1978), *cert. denied*, 439 U.S. 1116 [200 USPQ 832] (1979). The Lanham Act was designed to prevent consumers from becoming confused as to either: (1) "the relationship between the trademark holder and a competitor seeking to use the trademark*1328 or a substantially similar mark in its own marketing efforts," or (2) the source of the product. *Home Box Office*, 832 F.2d at 1314. The Act was meant also to prevent a competitor from free-riding on a trademark owner's goodwill and reputation. See *Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 523 F.2d 1331, 1342 [186 USPQ 436] (2d Cir. 1975), *quoted in Lois Sportswear U.S.A., Inc.*, 799 F.2d at 872.

Therefore, the confusion requirement should not be read too narrowly; in "order to be confused, a consumer need not believe that the owner of the mark actually produced the item and placed it on the market. ... The public's belief that the mark's owner sponsored or otherwise approved the use of the trademark satisfies the confusion requirement." *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 204-05 [203 USPQ 161] (2d Cir. 1979). Plaintiff therefore will satisfy the confusion requirement if it proves that defendant's use of plaintiff's mark confused consumers as to plaintiff's association with or endorsement of defendant's product. See *Lois Sportswear*, 799 F.2d at 872; *Consumers Union of U.S. v. General Signal Corp.*, 724 F.2d 1044, 1052 [221 USPQ 400] (2d Cir. 1983), *cert. denied*, 469 U.S. 823 [224 USPQ 616] (1984).

Likelihood of confusion is usually measured by applying the test formulated by Judge Friendly in *Po-*

laroid Corp. v. Polarad Electronics Corp., 287 F.2d 492, 495 [128 USPQ 411] (2d Cir.), *cert. denied*, 368 U.S. 820 [131 USPQ 499] (1961). This test examines the strength of the mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap between his product and the alleged infringer's, actual confusion, the defendant's good faith, the quality of defendant's product, and the sophistication of the buyers. *Polaroid*, 287 F.2d at 495. The *Polaroid* test, however, is not a rule or rigid formula, but rather is a useful guide to help measure the likelihood of confusion that must be applied with due regard for the "peculiar circumstances" of each case. *Lois Sportswear*, 799 F.2d at 872.

This case is peculiar in relation to the *Polaroid* test, because that test was developed to judge likelihood of confusion when determining "how far a valid trademark shall be protected with respect to goods other than those to which its owner has applied it. ..." *Polaroid*, 287 F.2d at 495. Here, defendant did not use plaintiff's trademark to designate its own product, but instead used it in "compatibility" advertising, or advertising about the product's fit with a competitor's product or service. Such compatibility advertising is similar to comparative advertising in that it provides useful information to consumers. So, for example, a competitor may use another's trademark when providing information about the substitutability of products because by doing so the "supplier engages in fair competition based on those aspects - for example, price - in which the products differ." *American Home Products v. Barr Laboratories*, 656 F.Supp. 1058, 1068 [3 USPQ2d 1194] (D.N.J.), *aff'd*, 834 F.2d 368 [5 USPQ2d 1073] (3d Cir. 1987). The Lanham Act thus does not prohibit all unauthorized use of a trademark. "Trademarks of a rival company can be used in competitive advertising, so long as the advertising 'does not contain misrepresentations or create a reasonable likelihood that purchasers will be confused as to the source, identity, or sponsorship of the advertiser's product.'" *Cuisinarts, Inc.*, 509

F.Supp. at 1042 (quoting *Smith v. Chanel, Inc.* 402 F.2d 562, 563-64 [159 USPQ 388] (9th Cir. 1968)).

In cases alleging trademark infringement in comparative advertising - usually based on preliminary injunction hearings rather than full-fledged trials - judges in this circuit have evaluated the likelihood of confusion on their own by looking at the facial ambiguity of the advertisements, as well as proof of actual confusion such as consumer surveys, to determine whether such confusion is likely. See *Home Box Office*, 832 F.2d 1311 [4 USPQ2d 1789]; *Cuisinarts, Inc.*, 509 F.Supp. at 1043. See, e.g., *Consumers Union*, 724 F.2d 1044 [221 USPQ 400] (§43(a) claim).

Based upon the *Polaroid* test and upon the facial ambiguity of the first two advertisements at issue in this case, there is a considerable likelihood that the 1987 and 1988 advertisements (PX 9, 10), would cause confusion as to Weight Watcher's endorsement or sponsorship of, or affiliation with, the Lean Cuisine products, and thus infringe Weight Watchers' trademark. But there is not such a likelihood that the most recent advertisement (PX 14, 15) would cause confusion, and thus it does not infringe Weight Watchers' trademark.

1. The Polaroid Factors

[1] The first *Polaroid* factor, strength of the mark, supports plaintiff's claim. As discussed above, "Weight Watchers" is a registered mark, which is presumed to be distinctive. Further, absent trademark registration, strength of mark is determined by classifying marks in ascending order as: (1) generic, (2) *1329 descriptive, (3) suggestive, and (4) arbitrary or fanciful. *Abercrombie & Fitch Co. v. Hunting World Inc.*, 537 F.2d 4, 9 [189 USPQ 759] (2d Cir. 1976). If the mark is generic, it is not entitled to protection even with proof of secondary meaning; if the mark is descriptive, it is entitled to protection upon proof of secondary meaning; and if the mark is suggestive or arbitrary, it is entitled to

protection even absent proof of secondary meaning. *PaperCutter, Inc. v. Fay's Drug Co., Inc.*, 900 F.2d 558, 561-62 [14 USPQ2d 1450] (2d Cir. 1990). Plaintiff has presented ample evidence that the "Weight Watchers" mark is a strong one; not only is it suggestive rather than descriptive, but Weight Watchers food products and the Weight Watchers diet have enjoyed such success over the past 25 years that the secondary meaning attached to the mark is indisputable. See *PaperCutter, Inc.*, 900 F.2d at 564.

Stouffer proffers the affirmative defense that it did not use the phrase "Weight Watchers" as a trademark or service mark, but rather to describe or identify, in good faith, the diet plan or company "Weight Watchers." (Answer P 46) Defendant seems to argue also that the phrase "Weight Watchers Exchanges" is different from the phrase "Weight Watchers," and thus cannot be excluded from use. (Answer P 58) Indeed, plaintiff cannot preclude all uses of the "Weight Watchers" trademark, but this does not prevent the phrase from being a trademark. Defendant itself seems to concede that "Weight Watchers" is a well-known name identifying the brand and diet plan by using the mark in its advertisement to try to attract Weight Watchers members to Lean Cuisine frozen foods.

The second factor, proximity of products, also weighs in favor of plaintiff. Stouffer's Lean Cuisine brand competes directly with Weight Watchers brand frozen entrees; in fact, some of the entrees featured in the Lean Cuisine advertisements even have the same names as Weight Watchers' frozen entrees.^{FN6} (See PX 10; DX IV) The third factor, bridging the gap, is irrelevant; Stouffer's Lean Cuisine and Foodway's Weight Watchers products occupy the same market.

The fourth factor, actual confusion, will be discussed in subsection 2 below.

[2] The fifth *Polaroid* factor, defendant's intent in using plaintiff's mark, favors neither plaintiff nor defendant. There is no evidence that defendant

meant to cause confusion as to endorsement or sponsorship by Weight Watchers,^{FN7} the purpose of the advertising campaign was to reach Weight Watchers members and convince them to eat Lean Cuisine by listing purported Weight Watchers exchanges, not to imply that Weight Watchers endorsed Lean Cuisine. (Tr. 808-09) Although Stouffer did intend to take advantage of Weight Watchers' goodwill by using the Weight Watchers trademark, see *Grotian, Helfferich, Schulz*, 523 F.2d at 1342, this is not a case of copying, in which awareness of a party's registered mark could signal bad faith. See *Centaur Communications v. A/S/M Communications*, 830 F.2d 1217, 1227-28 [4 USPQ2d 1541] (2d Cir. 1987). Rather, Stouffer's intent to use the Weight Watchers trademark in a compatibility advertisement cannot weigh in favor of plaintiff here regardless of Stouffer's purposeful exploitation of the Weight Watchers trademark, because unlike instances of purposeful copying, compatibility ads are meant to convey product information useful to consumers if conveyed accurately.

The sixth *Polaroid* factor, the quality of defendant's product, is not relevant here. Although the parties no doubt would strenuously*1330 disagree, I do not find that one product is superior in quality to the other; both reach the same market and sell in the same price range.

Finally, the last *Polaroid* factor examines the sophistication of buyers. Allegedly, less sophisticated buyers spend less time examining the product and thus are more likely to be misled or confused. See *McGregor-Doniger Inc. v. Drizzle Inc.*, 599 F.2d 1126, 1137 [202 USPQ 81] (2d Cir. 1979). Plaintiff argues that the general public is not knowledgeable about "exchanges," and thus the reference to exchanges in the advertisement is likely to confuse consumers about the connection between Weight Watchers and Stouffer. Plaintiff argues also that because the price of the products is low, consumers spend less time considering the purchase and are more likely to become confused between the two products.

These arguments are valid when applied to people who are not Weight Watchers members or are otherwise not knowledgeable about diet programs and foods. But those people are also less likely to be potential consumers of diet foods, and as to more sophisticated buyers, the sophistication factor can cut the other way. The advertisement is targeted toward (Tr. 808-09) and would catch the attention of Weight Watchers members (DX CQ at 11), who not only are quite sophisticated about the exchange system and their knowledge about food products, but are likely to spend time considering their food purchases and figuring out whether these purchases can fit into their diet program. Other people who buy low calorie frozen food also are likely to be on diets or watching their weight, and thus more careful and knowledgeable about the foods they buy. Therefore, potential buyers of the product are less likely to be confused.

On the other hand, Weight Watchers members are the people who are most vulnerable to defendant's use of the Weight Watchers mark. Their mistaken belief that Weight Watchers endorses Lean Cuisine products would be most likely to prompt them to buy Lean Cuisine frozen foods. Therefore, an advertisement could confuse sophisticated buyers no matter how long they contemplate their purchases if the advertisement confuses them about a subject that constitutes part of their "sophistication."

Although the sophistication-of-the-buyers factor here cuts both ways, I find that because the ad was specifically geared toward Weight Watchers members - who know from what they hear at Weight Watchers meetings that Stouffer and Weight Watchers are not connected, and who are likely to read the fine print of an advertisement that lists exchanges for frozen entrees, particularly when, as in the 1989 ad, that fine print is a part of the ad they are supposed to clip and save, and when that print is at least as prominent as the exchanges themselves - this factor favors defendant. But this does not mean, as discussed below, that the first two ads do not use the Weight Watchers mark in a manner con-

fusing enough to befuddle both Weight Watchers members and ordinary impulsive consumers.

2. Actual Confusion

(a) Market Research Surveys

The "actual confusion" factor was one of the major battlegrounds in this case, and both sides commissioned experts to conduct consumer surveys to test whether the Stouffer advertisements engendered confusion. As might be expected, each side's expert on market research came to a conclusion that disfavored the other: Weight Watchers' survey found confusion, while Stouffer's survey revealed no confusion. Both surveys contained serious methodological flaws discussed below. Consequently, I accord plaintiff's survey slight weight, with strong misgivings about its improper universe and improper miscategorization of responses. I accord no weight to defendants' survey, which was designed to reveal no confusion no matter how confusing the ad at issue actually was.

[3] While a survey may establish likelihood of confusion, the survey must "have been fairly prepared and its results directed to the relevant issues." *Universal City Studios v. Nintendo Co., Ltd.*, 746 F.2d 112, 118 [223 USPQ 1000] (2d Cir. 1984) (quoting *National Football League Properties, Inc. v. Wichita Falls Sportswear, Inc.*, 532 F.Supp. 651, 657 [215 USPQ 175] (W.D. Wash. 1982)). The criteria for the trustworthiness of survey evidence are that: (1) the "universe" was properly defined; (2) a representative sample of that universe was selected; (3) the questions to be asked of interviewees were framed in a clear, precise and non-leading manner; (4) sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted; (5) the data gathered was accurately reported; (6) the data was analyzed in accordance with accepted statistical principles and (7) objectivity of the entire process was assured. *Toys R Us,*

Inc. v. Canarsie Kiddie Shop, Inc., 559 F.Supp. 1189, 1205 [217 USPQ 1137] (E.D.N.Y. 1983). A court may place *1331 such weight on survey evidence as it deems appropriate, and many courts have ignored such evidence when it does not meet the criteria. See *Universal Studios*, 746 F.2d at 118; *Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312, 317 [216 USPQ 272] (2d Cir. 1982); *Inc. Pub. Corp. v. Manhattan Magazine, Inc.*, 616 F.Supp. 370, 390-94 [227 USPQ 257] (S.D.N.Y. 1985), *aff'd*, 788 F.2d 3 (2d Cir. 1986); *American Home Products*, 834 F.2d at 371.

At trial, plaintiff introduced three market research studies - one for each Lean Cuisine ad - overseen by William Weilbacher, a former advertising research executive and the president of Bismark Corporation, a marketing and advertising consulting firm. (PX 82) Plaintiff introduced reports summarizing the method and findings for each of the studies (PX 27A-C), questionnaires both for screening respondents and asking the main questions (PX 28B, 29B, 30B), survey coding materials (PX 27-AA, 27-BA, 27-CB, 27-CC, 27-CD), and reports validating respondents' participation in the survey. (PX 28-A, 29-A, 30-A) In this study, participants were approached in shopping malls and asked preliminary questions to determine whether they qualified for the "universe" of the survey. The universe of the Weight Watchers surveys was defined as women between the ages of 18 and 55 who have purchased frozen food entrees in the past six months and who have tried to lose weight through diet and/or exercise in the past year. (PX 27-A, 27-B, 27-C, Tr. 235)

The Weilbacher studies did not limit the universe to consumers who had purchased a *diet* frozen entree (Tr. 269), or who had tried to lose weight through diet as opposed to exercise; therefore, some of the respondents may not have been in the market for diet food of any kind, and the study universe therefore was too broad. Sloppy execution of the survey broadened the universe further when interviewers mistakenly included participants who did not quali-

fy even under Weilbacher's standards. For example, on some of the qualifying surveys, not all of the questions qualifying participants for the universe were answered; therefore, it is impossible to discern whether the respondent fit within the defined universe. (Tr. 342-351; PX 28-B, 29-B, 30-B) Flaws in a study's universe quite seriously undermine the probative value of the study, because to "be probative and meaningful ... surveys ... must rely upon responses by potential consumers of the products in question." *Dreyfus Fund Inc. v. Royal Bank of Canada*, 525 F.Supp. 1108, 1116 [213 USPQ 872] (S.D.N.Y. 1981), *quoted in Universal Studios, Inc.*, 746 F.2d at 118. *See also Inc. Pub. Corp.*, 616 F.Supp. at 393. Respondents who are not potential consumers may well be less likely to be aware of and to make relevant distinctions when reading ads than those who are potential consumers. The ability to make relevant distinctions is crucial when what is being tested is likelihood of confusion.

Further, the results of plaintiff's market study overstated actual confusion as to source or endorsement engendered by the advertisement by testing for any "connection" between Stouffer or Lean Cuisine and Weight Watchers in consumers' minds after reading the ad. Interviewers first asked participants to look at three different print advertisements, one of which was the Lean Cuisine ad, and identify who sponsored the advertisement and why the person thinks so. Then, they told participants to look again at the Lean Cuisine ad, and to determine whether "you think there is any connection between Stouffers Lean Cuisine and Weight Watchers, or not?" If participants found a connection, they were asked to describe the connection.

In analyzing the responses, Weilbacher divided the connections seen by respondents into 6 categories: (1) there is a business connection between the two companies; (2) "the ad connects them - Stouffer's 'presents' Weight Watchers" (3) Stouffer's used the Weight Watchers exchanges; (4) Stouffer's products are interchangeable with Weight Watchers; (5) both products are diet foods; (6) all other single men-

tions. (PX 27-C at 085491; 27-B at 085006; 27-A at 080007) Therefore, although the study relating to the 1989 advertisement found that 63.5 percent of respondents saw a connection between Stouffer's Lean Cuisine and Weight Watchers, Weilbacher found that 13.2 percent of total respondents saw a "business connection" between the two companies.

Only the "business connection" category shows confusion as to source or endorsement, and thus only this category is relevant to plaintiff's infringement claim. Some of the responses which Weilbacher placed within that category, when examined individually, do not show such confusion. For example, in the survey for the 1989 ad, Weilbacher categorized 24 respondents in Pittsburgh as having found a business connection, but only 13 individual responses, allegedly taken down verbatim, seem to indicate a confusion as to the relationship between Weight Watchers and Stouffer or Lean Cuisine. (PX 27-C at 085492-93) Weilbacher reports that 16 respondents from Providence allegedly saw a business connection; I agree only as to 13. *1332 (PX 27-C at 085493-94) As to the other 39 respondents, from Portland-Vancouver and Forth Worth, I agree with Weilbacher's categorizations in only 29 cases. (PX 085494-97) Therefore, after examining the individual responses to the Weilbacher survey, I find that only 9.2 percent of respondents were confused as to endorsement, sponsorship or source after reading the 1989 advertisement.

In his other studies, Weilbacher found that 14.7 percent, or 22 out of 150 respondents thought there was a business connection after reading the 1987 ad. (PX 27-B at 085006) I found only 8.6 percent, or 18 out of 150 respondents, who indicated that they saw such a connection. Weilbacher found that 17.7 percent, or 54 out of 305 respondents inferred such a connection from the 1988 advertisement. (PX 27-A at 080007) I found that 15.1 percent, or 46 of these respondents, saw a business connection.

Plaintiff argues that in Lanham Act cases, courts sometimes have relied on relatively small showings of actual consumer confusion to find likelihood of

confusion and thus infringement. See *Grotrian, Helfferich*, 365 F.Supp. 707, 716 [180 USPQ 506] (S.D.N.Y. 1973), *aff'd*, 523 F.2d 1331 [186 USPQ 436] (2d Cir. 1975) (7.7 percent business connection and 8.5 percent name confusion); *RJR Foods, Inc. v. White Rock Corp.*, 603 F.2d 1058, 1061 [203 USPQ 401] (2d Cir. 1979) (15 to 20 percent consumer confusion); *McDonald's Corp. v. McBagel's, Inc.*, 649 F.Supp. 1268, 1277 [1 USPQ2d 1761] (S.D.N.Y. 1986) (24.8 percent confusion). In these cases, however, at least 15 percent of consumers were confused as to source or endorsement, while here, at least as to the 1989 advertisement, the study shows 9.2 percent confusion. More important, however, is that even accurate and probative market research does not conclusively decide the issue of likelihood of confusion in Lanham Act cases. See *McBagel's, Inc.*, 649 F.Supp. at 1278; *Worthington Foods, Inc. v. Kellogg Co.*, 732 F.Supp. 1417, 1446 [14 USPQ2d 1577] (S.D. Ohio 1990). Here, the flaws in plaintiff's market research methods lead me to accord very little weight to the results, see *Universal Studios, Inc.*, 746 F.2d at 118, and therefore such results do not affect my conclusion that as to the 1989 advertisement, there is little likelihood of confusion.

The market study conducted for defendants in this case has even less probative value. It is obvious that Dr. Jacob Jacoby, a veteran of the trademark litigation arena and the creator of the Stouffer survey, ^{FN8} constructed the study specifically to disprove consumer confusion regardless of participants' reactions to the advertisements. Jacoby's study focused on confusion as to the goal or source of the advertisement, but did not focus upon confusion as to endorsement from the message in the advertisement; as the study report itself explains, "[t]he basic objective of this investigation was to determine whether ... respondents would incorrectly identify Weight Watchers as the product-service being advertised or as the source of the Lean Cuisine advertisement." (DX MJ at 4)

Respondents first were screened for membership in

the universe, which Jacoby defined as including both males and females, aged 18 to 55, who in the past six months either bought frozen food meals or snacks for themselves or someone else in their household, ate any frozen meal or snack, or were involved in selecting the brand of frozen foods used in their household. The survey excluded those who worked in certain industries, people who normally wore eyeglasses but did not have the glasses with them, and people who had participated in a market research study in the past three months. (DX MJ at 8) As with the Weilbacher survey, the universe here does not focus upon people who ate diet or low-calorie frozen foods or even people who were trying to lose weight through dieting. Although the screener questionnaire did contain a question asking whether respondent had eaten frozen food as part of a plan to lose weight, this question was not used to narrow the universe for the study as a whole. ^{FN9} Although the universe was thus flawed, that was not the main problem with the study. The study's two major shortcomings were its failure to focus on the kind of confusion that was at issue in *1333 this case, and its use of "control" advertisements supposedly to show that consumers were generally confused about advertisements and thus to justify disregarding most confusion as irrelevant "noise."

In the main part of the study, participants were shown three different advertisements, including the 1989 Stouffer ad mentioning Weight Watchers. The two other advertisements also involved two products each: one seemed to be jointly sponsored by Japan Airlines and AT & T, proclaiming that a JAL ticket will get you to Tokyo in about 14 hours, while an AT & T card will get you back to the U.S. in about 14 seconds; (DX MJ App. A) the second was a comparative advertisement showing that Now cigarettes have 3 mg. of tar while Carlton 100's cigarettes have 5 mg. of tar (DX MJ App. A) After being shown each advertisement, participants were asked what product or service was being advertised; when respondents did not know, the interviewer asked whose product or service was advertised, and

when respondents did know, the interviewer asked who placed the ad. As to the Lean Cuisine ad, which was always shown last, the interviewer asked in addition whether the respondent noticed the name "Weight Watchers" in the ad, and whether or not the name Weight Watchers meant anything to the respondent. (DX MJ App. B)

The confusion which the study attempted to record, therefore, related to whose products were being advertised and who placed the ad. The study did not consider the possibility that consumers would know that Stouffer or Lean Cuisine placed the ad, while also thinking that Lean Cuisine and Weight Watchers were part of the same company, cooperating, or endorsing each other's products. Although Jacoby tried to mitigate this problem by adding extra questions about the Lean Cuisine ad, these questions did not focus upon the use of the name "Weight Watchers" in the ad, but seemed designed to elicit the respondent's perception of Weight Watchers in general, wholly apart from the advertisement.

Further, although Jacoby found in his study that 9 percent of the respondents were confused as to the Lean Cuisine ad, Jacoby used the control ads to "adjust for noise factors (such as guessing) and the level of confusion that might be expected when these particular respondents would look at any ad. When this adjustment is made, it can be seen that the level of confusion that can be attributed to the Lean Cuisine ad is essentially zero." (DX MJ at 24) The problem with this method is that it assumes that the existence of confusion in these other ads sets a constant or permissible level of confusion which an ad mentioning more than one product must exceed in order to be actionable. Not only is this an incorrect assumption, but it also assures a party's control over the study's outcome by use of the control ads.

Jacoby's theory of "noise" is based upon his previous research on miscomprehension of communications, where he found that in general, 15 to 23 percent of people tested miscomprehend magazine advertisements.^{FN10} (Tr. 1237) But in the study at is-

sue, Jacoby eliminated "noise" based upon high confusion over the control ads, at least one of which - the JAL/AT & T ad - was in fact extremely confusing as to source, sponsorship and endorsement. It is not surprising that when shown an advertisement that seemed to promote both JAL tickets and AT & T, 31.8 percent of respondents were confused, or that when shown an ad comparing two kinds of cigarettes, stating merely that one was "lowest," 32.7 percent of respondents, many of whom may well have been non-smokers, were confused. Confusion responses were deceptively higher for control ads than for the Lean Cuisine ads also because respondents all had eaten or had helped choose frozen meals, but did not necessarily smoke or use long distance services, and thus were more sophisticated and knowledgeable with respect to the Lean Cuisine ad.^{FN11}

The flaws in the universe, design and interpretation of defendants' study undermine its probative value, and it deserves no weight in measuring actual confusion over the 1989 advertisement.

(b) *The Confusing Presentation of the Ads*

***1334** Although courts must focus upon "market conditions instead of in-chamber inspections" when determining the existence of actual confusion, courts may combine empirical evidence with visual inspection of the allegedly infringing use as part of this determination. *See, e.g., Charles of the Ritz Group, Ltd. v. Quality King Distributors, Inc.*, 832 F.2d 1317, 1322 [4 USPQ2d 1778] (2d Cir. 1987). Further, because both parties' surveys are highly problematic, it is important to examine whether the ads are confusing on their face.

The 1987 advertisement that Stouffer placed in *Parade* magazine carried a large headline with pictures of Lean Cuisine boxes below. The headline read: "Lean Cuisine Entrees Present 25 Ways To Get More Satisfaction From Your Weight Watchers Program," and then in smaller letters, "Weight

Watchers Exchanges For Lean Cuisine Entrees.” (PX 9) One easily could conclude from reading the ad not only that Lean Cuisine is helping people get more satisfaction from their Weight Watchers program, but also that the Lean Cuisine brand is affiliated with the Weight Watchers program or that Weight Watchers endorses Lean Cuisine entrees.

[4] Although this advertisement contains a disclaimer that the exchanges it lists are based solely on published Weight Watchers information, and that the list of exchanges does not imply approval or endorsement of those exchanges by Weight Watchers, this disclaimer appears in minuscule print on the very bottom of the ad. Because of its location and size, the disclaimer does not effectively eliminate the misleading impression conveyed in the ad's large headline.

Disclaimers that emphasize the source of a product often can reduce or eliminate consumer confusion, and have been used by courts as remedies in trademark cases. *See Soltex Polymer Corp. v. Fortex Industries, Inc.*, 832 F.2d 1325, 1328 [4 USPQ2d 1785] (2d Cir. 1987); *Berlitz Schools of Languages of America, Inc. v. Everest House*, 619 F.2d 211, 213 [205 USPQ 1153] (2d Cir. 1980). The Court of Appeals has held, however, that each case must be judged by considering the business and its consumers, as well as the proximity of the disclaimer to the infringing statements, and that when disclaimers are used as remedies, the burden is on the infringer to prove that they reduce the likelihood of confusion. *Home Box Office*, 832 F.2d at 1315. *See also Charles of the Ritz*, 832 F.2d at 1324. The Court has noted also that “there is a body of academic literature that questions the effectiveness of disclaimers in preventing consumer confusion as to the source of a product,” specifically, an article co-authored by Stouffer's own survey expert, Dr. Jacob Jacoby. *Home Box Office*, 832 F.2d at 1315. *See Jacoby & Raskoff, Disclaimers as a Remedy for Trademark Infringement Litigation: More Trouble Than They Are Worth?*, 76 Trademark Rept. 35 (1986).

The next advertisement, run in January 1988, carried an even more confusing headline: “Stouffer's presents Weight Watchers exchanges for all 28 Stouffer's Lean Cuisine entrees.” (PX 10) The word “presents” in between the marks “Stouffer's” and “Weight Watchers” creates the impression either that Stouffer owns Weight Watchers, or more likely that Stouffer is presenting these exchanges for Weight Watchers - in other words, that Weight Watchers gave Stouffer the exchanges to publish in the ad. This headline is ambiguous on its face and thus threatens a strong likelihood of consumer confusion. *See Home Box Office*, 832 F.2d at 1315; *Cuisinarts, Inc.*, 509 F.Supp. at 1043.

Further, the disclaimer for this advertisement not only is printed in small type, but appears below the dotted line that suggests where consumers should cut out the ad if they wish to use it for reference. Thus, a Weight Watchers member who cuts out the ad in order to keep a copy of the exchanges would then consult the ad each time without seeing the disclaimer. Therefore, the disclaimer cannot eliminate the confusion created by the misleading headline.

By contrast, the 1989 advertisement (PX 14, 15) is not confusing on its face. The headline does not say that Stouffer's presents Weight Watchers exchanges, or that Stouffer's presents ways to get more satisfaction out of Weight Watchers; it states merely that Stouffer's presents exchanges for Lean Cuisine items “to fit into your Weight Watchers program.” By using “exchanges” instead of “Weight Watchers exchanges,” Stouffer correctly implies that Stouffer, and not Weight Watchers, calculated the exchanges for its products - an implication confirmed by the disclaimer below. The disclaimer, while in relatively small print on the bottom, appears inside the dotted line surrounding the exchange information, and is in much larger type than the exchange listings themselves.

It is possible that someone completely unfamiliar with Weight Watchers frozen entrees, the Weight Watchers diet plan or any other diet involving ex-

changes might glance quickly at the ad and conjecture that simply because Stouffer used the Weight Watchers mark in the advertisement, Weight Watchers*1335 must have given Stouffer permission to use the trademark, and thus must not disapprove of Stouffer's Lean Cuisine entrees. However, absent a convincing showing of actual confusion, absent a facially confusing or intentionally confusing message, and absent a tipping of the balance one way or another under the *Polaroid* test, the potential for such conjecture cannot justify proscribing advertising that conveys useful information. Further, such conjecture presents a limited potential for damage to plaintiff, as it is unclear how consumers unfamiliar with diet frozen food or the Weight Watchers diet would be affected by a vague notion of connection between Weight Watchers and Lean Cuisine, even if such readers were to consider buying low-calorie frozen entrees.

Although the Lanham Act was designed to prevent a competitor from free-riding on a trademark owner's goodwill and reputation, see *Lois Sportswear*, 799 F.2d at 872, a company cannot use the Act to prevent competitors from ever referring to its trademark. "The registering of a proper noun as a trademark does not withdraw it from the language, nor reduce it to the exclusive possession of the registrant which may be jealously guarding against any and all use by others." *Societe Comptoir De L'Industrie Cotonniere Etablissements Boussac v. Alexander's Department Stores, Inc.*, 299 F.2d 33, 36 [132 USPQ 475] (2d Cir. 1962).

A finding that the 1989 advertisement infringed the Weight Watchers trademark solely because it used the mark to point out Lean Cuisine's fit into the Weight Watchers program would unduly discourage companies from advertising their products' compatibility with other companies' services or products. "The free flow of information regarding the substitutability of products is valuable to individual consumers and to society collectively, and by providing it a supplier engages in fair competition based on those aspects - for example price - in

which the products differ" *American Home Products*, 656 F.Supp. at 1068. Restricting the ability of companies to provide this information also would circumscribe commercial expression, which "assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas v. Public Service Comm. of New York*, 447 U.S. 557, 561-62 (1980). Of course, companies cannot make untruthful or misleading statements; as discussed below, to the extent that the exchange information listed by Stouffer is consistently out of line with the Weight Watchers system with respect to optional calories, such inaccuracy may not be repeated.

[5] For the above reasons, the 1987 and 1988 advertisements infringe plaintiff's trademark by creating confusion as to source and endorsement, but the 1989 does not. FN12

III.

Weight Watchers claims that these ads constitute false advertising under §43 of the Lanham Act because: (a) they give the misleading impression that the Lean Cuisine meals are equivalent to or interchangeable with Weight Watchers food products, when in fact Lean Cuisine meals do not "fit into" the Weight Watchers program; (b) the advertisements do not correctly reflect the Weight Watchers exchange system; and (c) although the ads refer to and list Weight Watchers exchanges, the Lean Cuisine packages list American Dietetic Association (ADA) exchanges, which are slightly different. (Pl. Posttrial Mem. at 20-22)

Because the 1987 and 1988 ads already have been found to infringe plaintiff's trademark, it seems unnecessary to consider whether as a result of this infringement they also constitute false advertising as to endorsement or connection. The 1987 and 1988 advertising will be enjoined because it infringes; it need not be enjoined redundantly on the ground that the infringement also misleads.

As set forth in greater detail below, the evidence does not support Weight Watchers' first theory of false advertising with regard to the 1989 advertisement (PX 15), as Lean Cuisine "fits" into the Weight Watchers program, but it does support Weight Watchers' second theory. Although Stouffer's exchanges*1336 have been revised to reflect fairly accurately the Weight Watchers exchange system, there remains a consistent discrepancy in the Stouffer presentation of Weight Watchers exchanges that seems calculated to place Weight Watchers at a competitive disadvantage. Finally, Weight Watchers has failed to prove its third theory of alleged confusion, arising from the use of Weight Watchers exchanges in the ads and ADA exchanges on the Stouffer packages.

A. Lean Cuisine's "Fit" Into the Weight Watchers Program

Weight Watchers claims that the Lean Cuisine meals do not "fit into" the Weight Watchers program. Stouffer counters that Weight Watchers' own system of measurement for food exchanges in its frozen entrees is not exact, and that Weight Watchers itself uses considerable discretion in its exchange classifications. Stouffer point out that Weight Watchers and Foodways calculate the exchanges in an occasionally arbitrary way, that Weight Watchers itself revised its exchange information prior to bringing this law suit, and that Weight Watchers members have sent letters revealing confusion about the way in which Weight Watchers arrives at exchanges for frozen entrees. (DX HX, HZ, IA, IB, IF, IJ, IK, IL, IS)

[6] Based on the Weight Watchers system of exchanges as provided to Weight Watchers members, the statement that Lean Cuisine entrees "fit" into the Weight Watchers program is not false. Although there may be minor discrepancies between the way Weight Watchers and Stouffer would count the food exchanges of given frozen meals, those differences do not materially affect the ability of

consumers to fit Lean Cuisine into their Weight Watchers program.

The Weight Watchers program encourages variety and flexibility. Most of its recent changes were designed to diversify the program. Thus, the Weight Watchers program has expanded its array of food exchanges, has added the "optional calorie" feature, has provided members with guidance for how to "count" party foods (PX 86-G) and meals in restaurants (PX 86-I), and has expanded its product line of processed foods which comply with the program.

Further, adherence to the Weight Watchers food plan necessarily involves certain levels of approximation. For instance, in measuring a one cup serving of strawberries to meet a "fruit exchange," (PX 86-B at 1), a member may measure the strawberries whole, so as to minimize the amount of food in the exchange, or she may cut the strawberries in quarters, so as to fit more fruit into the cup, or she may cut them into thin slices, thus "squeezing" the most out of the exchange. Members are encouraged to be as precise in their measurements as possible, but there is necessarily an element of approximation. Even the Week One booklet recommends weighing and measuring not as an end in itself, but as a tool "until you become familiar with proper portions." (Pl. Exh. 86-A at 23)

Recognizing that variation is particularly significant when eating out, the Weight Watchers "Dining Out" booklet advises that because "it isn't possible to know the exact ingredients and amounts contained in each dish, and recipes do vary from one restaurant to another our guidelines provide approximate Exchanges. Nor is it possible for you to know precise portion sizes in restaurants. Use your judgment and the discerning eye you've developed these past few weeks while weighing and measuring portions at home." (PX 86-I at 7) By claiming that Lean Cuisine does not fit into the Weight Watchers program, Weight Watchers has simply refused to extend its policy of encouraging variety and flexibility to foods made by competitors of the Weight

Watchers brand.

During cross-examination of Ronnie Amster, a Weight Watchers group leader and member services coordinator for Nassau County, a lawyer for Stouffer asked whether frozen foods other than those licensed by Weight Watchers can be eaten under the food plan. Amster first replied: "At the member's own responsibility. Not as fitting into the exchange program." But soon she admitted that a member could eat a frozen prepared meal other than a Weight Watchers meal while on the Weight Watchers plan if "they accept the responsibility for eating that or use the guidelines that are suggested in the dining-out guide." (Tr. 214)

Weight Watchers contends that the exchanges for Lean Cuisine entrees listed in the Stouffer ads do not "fit" into the program because of slight discrepancies between ingredients and the exchanges. However the evidence shows that because food ingredients have mixed nutrient values, one could assign different sets of exchange values to the same product merely by categorizing foods in different ways, and Weight Watchers' own exchanges reflect subjective judgments. Stouffer cannot be expected to calculate exchanges more "accurately" than Weight Watchers itself. Weight Watchers' own nutritional expert witness, Dr. Barbara Levine, conceded that Weight Watchers' calculation of exchanges is not perfect, as *1337 "there are minor discrepancies in the comparison of [Weight Watchers'] package listings to the exchange system as presented in the Weight Watchers booklet...." (PX 43-B) For example, she found that Weight Watchers' "Cheese Pizza" entree does not conform to Weight Watchers' stated exchange guidelines because there is no exchange listing to account for the entree's corn oil and soybean oil. Neither is there a fat exchange listed on the box, where oil would ordinarily be classified, nor is the appropriate caloric value of the oil included in an optional calorie tally. (*Id.* at 087013) Nor is the sugar and modified food starch used in the product accounted for in optional calories, the only category under which sugar and

cornstarch can be counted. (*Id.*, PX 86-A, Optional Calories List, at 1) Similarly, in Dr. Levine's view, Weight Watchers' "Oven Fried Fish," "Fillet of Fish Au Gratin" and "Baked Cheese Ravioli" fail to conform precisely to Weight Watchers' stated exchange guidelines. (PX 43-B)

In addition, defendant has compiled a list of foods used in the preparation of Weight Watchers frozen dinners which apparently are not included in the Weight Watchers exchange listing on the package. (DX NQ, NR) For example, in some entrees oil is a listed ingredient, yet no fat exchange listing reflects that oil is included. (Def. Exh. NR) Consumers also have noticed certain discrepancies in their calculations of exchanges from the ingredients or nutritional information on the box and the exchanges listed. (DX HZ - IV) Weight Watchers has written in response that discrepancies between the exchanges listed on the package and the ingredients reflect Weight Watchers' calculation of exchanges based upon an accurate nutrition analysis for every product which complies with the program. In looking at exchanges on the boxes, "one fact to remember is [that] no food item is 100 percent of any one nutrient, such as protein, carbohydrate or fat. All foods are combinations of protein, carbohydrate, fat, water, vitamins, etc." (*See* DX IJ, IL, IR, IT) Weight Watchers relies on Allen Ho, its manager of license operations, to calculate the exchanges listed on Foodways boxes, and it is up to him to decide under which exchange to list a food item. In December, 1988 and January 1989, Ho reviewed the exchange statements for Weight Watchers frozen entrees and made some changes; for example, he changed the number of optional calories listed for certain entrees. (DX JB, JC) Stouffer has suggested that Weight Watchers made these changes as a result of this litigation, knowing that it would not be in a position to criticize the Lean Cuisine exchanges if Weight Watchers' own exchanges were not accurate. Regardless of the reasons for the review, such a reassessment illustrates at the very least that there may be more than one proper way to classify exchange information for a

frozen entree.

Weight Watchers relied heavily in criticizing the Stouffer exchange calculations on Ho, who is the final authority in setting exchange values of frozen meals produced by Weight Watchers licensees. But Ho did not present an objective standard against which his own calculations can be measured. At bottom, Weight Watchers' position amounts to claiming that the only permissible standard for measuring the exchanges in frozen entrees is Allen Ho. However, that conflicts with the entire notion of Weight Watchers as a diet system that its members may use with foods other than those sold under the Weight Watchers name, and with the information Weight Watchers itself provides to its members. In order to generate exchanges that "fit" the Weight Watchers program, Stouffer need not calculate the exchanges exactly as Allen Ho would calculate them; this would be an impossible feat, as Lean Cuisine does not have access to Weight Watchers' recipes, which are trade secrets, and thus does not know how Weight Watchers calculates exchanges on the products its franchisees produce from secret recipes. Nor does Stouffer have access to Allen Ho. What Stouffer must do, however, in order to "present exchanges ... to fit into your Weight Watchers Program" without being misleading is to apply all the elements of the Weight Watchers system made available to Weight Watchers members, and calculate exchanges under that system as accurately as would a scrupulous adherent to that system. Except as set forth below, Stouffer has done so.

B. The Accuracy of Stouffer's Exchange Information

Stouffer's calculation of the six major exchange groups appears in general to be accurate, and in most entrees all ingredients seem to be accounted for under exchange categories. However, what Stouffer cannot do with impunity is to put itself at a competitive advantage by excluding categories used

by Weight Watchers and manipulating its exchanges to seem more attractive to Weight Watchers members. In one respect, optional calories, that is what it has done. Stouffer has not listed optional calories for entrees containing ingredients, such as sour cream, that can be listed only as optional calories *1338 under the Weight Watchers system. DeAnne Hrabak, a nutritionist for Stouffer who calculated the exchanges for Lean Cuisine products testified that it was not necessary to put optional calories into the advertisements because - except for amounts of optional calorie food which were too insignificant to be counted - all food in the Lean Cuisine products was accounted for as an exchange when the Weight Watchers program allowed that food to be listed as either an exchange or an optional calorie food. (Tr. 991-999, 1097, 1104, 1133) In other words, many of the food items listed as optional calories are listed also on the exchange lists; so, for example, Hrabak did not list the flour in a Lean Cuisine meal as optional calories because she instead counted it as a bread exchange according to the Weight Watcher guidelines in the Week 5 booklet. (Tr. 994; See PX 86-E at 7) This is acceptable, because it accounts for all ingredients.

Hrabak said also, however, that when foods that could be counted only as optional calories, such as sour cream, were used in the Lean Cuisine recipes, they were in amounts much smaller than the amounts listed in the Weight Watchers published materials as calling for a calculation of optional calories. Considering the low number of calories in each entree, this statement sounds correct insofar as the additional few calories would not be significant. Nevertheless, just because certain optional calorie food is listed in the Weight Watchers booklet as a "100 Calorie Food" does not mean that even a far smaller amount should not be listed as 10 or 15 optional calories; indeed, these are the amounts in which Weight Watchers lists optional calories on its own brand of food.

Stouffer's calculation of exchanges for its 1989 advertisement by giving all nutrients a value in ex-

changes, thereby excluding optional calories, mirrors the way in which Weight Watchers shifted nutrients from one exchange to another before this litigation began. In fact, Dr. Levine criticizes the exchange listings in the February 1989 ad in much the way that she and Stouffer have criticized the categorization of Weight Watchers entrees. Levine argues that the Lean Cuisine exchange listings fail adequately to reflect optional calories and fat exchanges. (Pl. Exh. 43-D) Weight Watchers does include optional calorie listings - usually of about 10 calories - in the exchange information on its packages. (DX JG)

The evidence suggests that Stouffer manipulated its presentation of optional calories for competitive advantage. Defendant for years has distributed booklets providing nutrition and diet exchange information for Lean Cuisine entrees. (DX I, J, and K) The 1984 booklet (DX I) shows optional calories for frozen entrees under the Weight Watchers exchange system. In the two subsequent revisions, however, (DX J and K) the optional calorie tally was omitted, often when there was no apparent change in the recipe for the relevant entree. For example, "Filet of Fish Florentine" in 1984 was described as having "3 protein exchanges, 1 vegetable exchange, 1/2 milk exchange and 15 optional calories." The serving size was described as 9 oz. and it contained 240 calories. (DX I at 201753) In the 1986 booklet, and in the 1989 ad, this entree was the same serving size and had the same number of total calories, but no optional calories were listed. (DX K at 201815) Stouffer apparently did not change "Spaghetti with Beef and Mushroom Sauce," or "Beef & Pork Canneloni with Mornay Sauce," but here again omitted classification of optional calories in the most recent exchange information.

Further, a few of the Lean Cuisine entrees contain sour cream or wine, foods which cannot be listed as exchanges and thus should have been counted as optional calories. As discussed above, Hrabak explained that these ingredients were added in such small portions that they are insignificant. (Tr.

993-999) Nonetheless, by omitting the optional calories in these entrees, Stouffer has failed to give Weight Watchers members the same information Weight Watchers would when describing its own products.

Stouffer should include optional calorie listings when optional calorie foods - that is, foods that do not fall under any exchange except optional calories - are used. Otherwise, the exchange information will seem deceptively more attractive to Weight Watchers members who do not wish to use up their optional calorie quota.

C. ADA vs. Weight Watchers Exchanges

Finally, plaintiff rests a false advertising claim on the advertisements' misleading implication, when combined with the Lean Cuisine boxes, that the Weight Watchers exchanges given in the ad are identical to the exchanges listed on Lean Cuisine boxes. In fact, the exchanges listed on the boxes are based upon an exchange system used by the American Diabetes Association and the American Dietetic Association (ADA), while the exchanges listed in the ads are supposedly based upon the Weight Watchers exchange system. Stouffer asserts that the ADA exchanges and the Weight Watchers *1339 exchanges are virtually identical, and that by using the ADA exchanges under its own mark, Weight Watchers in effect is preventing others from using a well-established system of dieting. This contention will be discussed in the counterclaim section below; for the purpose of this false advertising claim, it can be assumed that the ADA exchanges and the Weight Watchers exchanges are different, because Weight Watchers - and thus Weight Watchers members - consider them to be different, and therefore these members would not want to be misled into confusing the two. The listing of Weight Watchers exchanges in the ads and ADA exchanges on the boxes has the potential to confuse and mislead consumers; it is quite conceivable that consumers will see the ads, buy Lean Cuisine entrees and use

the exchange information on the packages without realizing that the exchanges on the boxes are not Weight Watchers exchanges. Nevertheless, plaintiff has failed to prove a false advertising claim based on this aspect of the ads because it has failed to offer any evidence of actual confusion.

When a merchandising statement or representation is literally or explicitly false, plaintiff may prevail even without proof of the advertisement's impact on the buying public. *Coca-Cola Co.*, 690 F.2d at 317; *American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 [198 USPQ 132] (2d Cir. 1978). If the advertisement, however, is implicitly rather than explicitly false, plaintiff can show false advertising under the Lanham Act only by presenting evidence that the public was misled, confused or deceived by the statement at issue. *Coca-Cola*, 690 F.2d at 317. The alleged misrepresentations must relate to an inherent quality or characteristic of the other product. See *Vidal Sassoon, Inc. v. Bristol-Meyers Co.*, 661 F.2d 272, 278 [213 USPQ 24] (2d Cir. 1981).

Although the exchange system constitutes an inherent quality or characteristic of the Weight Watchers program, and therefore can be the basis for a false advertising claim, the alleged misrepresentation that the exchanges are the same on the boxes and the ads is implicit rather than explicit. The 1987 and 1988 ads state, in the copy, that consumers should "look on the back of Lean Cuisine packages for ADA diet exchanges," and explain in a footnote that the ADA exchanges are based on diet exchanges provided by the American Diabetes Association, Inc. and The American Dietetic Association. (PX 9, 10) The 1989 ad refers to the ADA exchanges on the boxes outside the dotted line where consumers are supposed to cut out the exchange information, although there is a footnote inside the line that explains that "Diet exchange calculations on package backs are based on Exchange Lists for Meal Planning [copyright] American Diabetes Association, Inc., and The American Dietetic Association." Therefore, confusion over the ex-

changes listed in the ads and those listed on the boxes, if any, will result not from explicitly false representations about which exchanges are referred to in the advertisements or on the boxes, but from an inference people might draw after having seen the ad - but without having it in front of them in the supermarket - that the exchanges on the box must be the same as those in the ad.

Plaintiff has presented no evidence that consumers used the exchange information on the Lean Cuisine packages as part of their Weight Watchers program because they were misled by the ads into thinking that the exchange information on the packages would fit into their Weight Watchers Diet. Nor did plaintiff's market survey test consumers' perceptions of the exchanges given in the ad and those on the boxes. Therefore, plaintiff has failed to prove its false advertising claim under the Lanham Act.

For the above reasons, I find that the statement in the Stouffer advertisements at issue that the Lean Cuisine entrees fit into the Weight Watchers program is not false. The 1989 ad constitutes false advertising only insofar as the exchange information does not include optional calories for certain entrees containing optional calorie ingredients, and Stouffer therefore is enjoined from running advertisements that do not contain optional calorie information. Because the 1989 ad includes listings for such foods as optional meats, cheese and tomato puree, which were not included in the previous advertisements, and because the 1989 ad has modified the exchange information in the 1987 and 1988 ads, I infer that Stouffer would not revert to any such omissions and alleged errors that appeared in the 1987 and 1988 ads, and therefore it is unnecessary to fashion a remedy with respect to such omissions and alleged errors.^{FN13}

IV.

Plaintiff asserts three claims under New York law. For the reasons set forth below, it has failed to

prove any of them.

***1340 A. Unfair Competition**

Plaintiff asserts that defendants' advertisements and promotional material violated the common law of unfair competition because they misappropriated plaintiff's mark and used it to misrepresent the source of defendants' goods. Although plaintiff uses the phrase "palming off" (Pl. Pre-Trial Mem. at 25), this case does not involve one party's attempt to pass off its goods as those of another, which until recently was the only basis upon which a party could base an unfair competition claim. *See American Footwear Corp. v. General Footwear Corp.*, 609 F.2d 655, 662 [204 USPQ 609] (2d Cir. 1979), *cert. denied*, 445 U.S. 951 [205 USPQ 680] (1980). Now, however, unfair competition encompasses "a broader range of unfair practices which may be generally described as a misappropriation of the skill, expenditures, and labor of another." *American Footwear*, 609 F.2d at 662. This includes misappropriating the goodwill of another company by misleading the public as to sponsorship or endorsement, as well as explicitly misrepresenting the source of the product.^{FN14} *See Ideal Toy Corp. v. Kenner Products Div. of General Mills Fun Group Inc.*, 443 F.Supp. 291, 305-09 [197 USPQ 738] (S.D.N.Y. 1977). Because I have found with regard to the Lanham Act claim that plaintiff has not proved likelihood of confusion in connection with the 1989 ad, either as to the source of the goods advertised or sponsorship, plaintiff's unfair competition claim fails as to the 1989 ad.

It is unnecessary to determine whether Stouffer's actions in connection with the 1987 and 1988 ads, which infringed plaintiff's trademark because of the likelihood that they would confuse consumers as to source or endorsement, also constitute common law unfair competition. Common law unfair competition claims closely parallel Lanham Act unfair competition claims; to the extent that they may be different, the state law claim may require an addi-

tional element of bad faith or intent. *See Saratoga Vichy Spring Co., Inc. v. Lehman*, 625 F.2d 1037, 1044 [208 USPQ 175] (2d Cir. 1980). As discussed below, the only remedy to which plaintiff is entitled here is an injunction, and Stouffer already is enjoined from publishing these ads based on federal law. To the extent that this injunction may be found improper, an injunction based on state law also would be improper. Therefore, it is unnecessary to reach this state law claim as to the 1987 and 1988 ads.

B. Dilution

[7] Plaintiff claims also that Stouffer's use of the Weight Watchers trademark violated New York's anti-dilution statute, N.Y. Gen.Bus.Law §368-d, which provides:

"Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark or trade name shall be a ground for injunctive relief in cases of infringement of a mark registered or not registered or in cases of unfair competition, notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services."

The New York Court of Appeals has explained that the

"evil which the Legislature sought to remedy was not public confusion caused by similar products or services sold by competitors, but a cancer-like growth of dissimilar products or services which feeds upon the business reputation of an established distinctive trademark or name.

Allied Maintenance Corp. v. Allied Mechanical Trades, Inc., 42 N.Y.2d 538, 544 [198 USPQ 418] (1977). Thus, this statute protects companies' distinctive marks from the blurring or dilution that results when the mark is used on dissimilar, non-competing products. The statute would protect against such diluting uses as "Dupont shoes, Buick aspirin tablets, Schlitz varnish, Kodak pianos, [and]

Bulova gowns." 1954 N.Y. Legis. Annual 49, quoted in *Sally Gee, Inc. v. Myra Hogan, Inc.*, 699 F.2d 621, 625 [217 USPQ 658] (2d Cir. 1983). The statute was not meant, however, to extend to cases where the defendant is a direct competitor selling similar products. See *Business Trends Analysts v. Freedonia Group, Inc.*, 650 F.Supp. 1452, 1458 (S.D.N.Y. 1987) (Weinfeld, J.); *Smithkline Beckman Corp. v. Procter & Gamble Co.*, 591 F.Supp. 1229, 1246-47 [223 USPQ 1230] (N.D.N.Y. 1984), *aff'd mem.*, 755 F.2d 914 (2d Cir. 1985); *Aris-Isotoner Gloves, Inc. v. Fownes Bros. & Co.*, *1341 *Inc.*, 594 F.Supp. 15, 24 [222 USPQ 489] (S.D.N.Y. 1983). But see *Sage Realty Corp. v. Sage Group, Inc.*, 711 F.Supp. 134, 142 (S.D.N.Y. 1989); *LeSportsac, Inc. v. K Mart Corp.*, 617 F.Supp. 316, 317 [227 USPQ 150] (E.D.N.Y. 1985); *Vitabiotics, Ltd. v. Krupka*, 606 F.Supp. 779, 784-85 [224 USPQ 730] (E.D.N.Y. 1984).

Because Stouffer and Weight Watchers compete directly in the frozen food market with strikingly similar products, plaintiff lacks standing to sue under N.Y. Gen.Bus. Law §368-d. Accordingly, this claim is dismissed.

C. Deceptive Trade Practices

Plaintiff claims that by creating the impression through their ads that Weight Watchers sponsored Stouffer products, or that Weight Watchers calculated the exchanges listed in the ads, defendants engaged in deceptive acts and practices under N.Y. Gen.Bus.Law §349.^{FN15} This statute provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." N.Y. Gen.Bus.Law §349(a). The law empowers the attorney general to sue companies on behalf of the state, but also allows any person "who has been injured by reason of any violation of this section" to sue to enjoin the unlawful act or practice, and to recover the greater of actual damages or 50 dollars. N.Y. Gen.Bus. Law §349(h).

[8] Defendants argue that as a competitor and not a consumer, plaintiff does not have standing to sue under §349. It is true, as Judge Weinfeld noted in *Genesco Entertainment v. Koch*, 593 F.Supp. 743, 751 (S.D.N.Y. 1984), that "Section 349 wears its purpose on its face; it is entitled 'Consumer Protection From Unfair Acts and Practices.'" However, *Genesco* did not hold that standing should be limited to consumers. In finding that private transactions without ramifications for the public at large were not a proper basis for suit under this section, Judge Weinfeld focused upon the public nature of the claim, rather than the status of the plaintiff. *Construction Technology, Inc. v. Lockformer Co., Inc.*, 704 F.Supp. 1212, 1222 [10 USPQ2d 1401] (S.D.N.Y. 1989). Therefore, competitors may have standing to sue, so long as some harm to the public at large is at issue. "While the statute does not preclude an action by one business against another, the gravamen of the complaint must be consumer injury or harm to the public interest." *AZBY Brokerage, Inc. v. Allstate Ins. Co.*, 681 F.Supp. 1084, 1089 n.6 (S.D.N.Y. 1988).

Here, the false advertising involving diet and food that Stouffer allegedly conducted clearly would involve a public harm if proved. Yet, although Weight Watchers may bring this claim, it cannot satisfy the necessary elements to prevail. Section 349(h) provides that a private party may bring a claim if it has been "injured by reason of any violation of this section." Although Weight Watchers has shown that the advertisements were misleading, it has failed to show either that Stouffer profited from these ads, or that plaintiff was damaged. Therefore, plaintiff has not proved its claim under the consumer protection statute.

V.

Stouffer asserts two main counterclaims: (1) Weight Watchers has misused its trademark to prevent competition and has engaged in other unfair acts in violation of the Lanham Act, Ohio law, and

N.Y. Gen. Bus. Law §349; and (2) Weight Watchers has engaged in false advertising under §43(a) of the Lanham Act and injurious falsehood under the common law by misrepresenting the uniqueness of its food plan and disparaging Stouffer's Lean Cuisine to Weight Watchers members. These counterclaims - from the claim that Weight Watchers would not allow Stouffer to advertise in Weight Watchers Magazine to the contention that Weight Watchers is deceitful when it "guarantees" its products^{FN16} - boil down to the same underlying contention: Weight Watchers uses its influence over its members to sell its branded products and to steer its members away from competitors' products. That Weight Watchers actually employs this marketing strategy reveals only that Weight Watchers - and more specifically, its parent company, Heinz - is interested in the bottom line just like any other company. Its tactics, though opportunistic, do not qualify as deceptive, unfairly predatory, or monopolistic.*1342 Most important, if Stouffer can make non-deceptive statements in advertising about its products' fit into the Weight Watchers program, then Weight Watchers can refute these statements in the marketplace if it also does so in a non-deceptive manner. Weight Watchers' ability to influence its members should not be held against the company to burden this right.

First, defendant claims that Foodways' Weight Watchers brand frozen entree packages constitute false advertising, because the exchange information on the packages is not necessarily accurate, and the statement on the packages that the entrees fit the Weight Watchers program is intentionally misleading. Yet, the only representation Foodways makes on these packages, besides listing the exchanges, is that "This product was prepared to fit the Weight Watchers Program and is useful for weight control when used strictly in accordance with the Weight Watchers food plan." (DX JG) It not only is silly for Stouffer to try to prevent Weight Watchers from making this benign statement, but it is also impossible in view of the finding sought by Stouffer and discussed extensively above that even Lean

Cuisine could "fit into" the Weight Watchers program.

Second, Stouffer grounds claims of unfair competition and injurious falsehood on letters - specifically one signed by Berger - sent by Weight Watchers to franchisees and members alerting them to the Lean Cuisine ads. Stouffer describes these letters as false and misleading, but Weight Watchers' statement to members that it can "stand behind" only its own products is not explicitly false, because in fact Weight Watchers does not have a duty to analyze other companies' products.

The thrust of the letters at issue was to emphasize Weight Watchers' policy for responding to members' concerns about processed diet foods made by other companies: "Weight Watchers does not stand behind the information statement on any brand of food except its own. We do not dispute or confirm the accuracy of any statement by any other manufacturer. Therefore, when it comes to these products, the member must use her/his own judgment." (DX BC)

Although Stouffer argues that the statement is false on its face because Weight Watchers exchanges are not in fact accurate, Stouffer cannot have its (diet) cake and eat it too: if it wants to argue that all exchanges are approximate and that the exchanges it has calculated fit into the Weight Watchers program, it cannot turn around and accuse Weight Watchers of calculating inaccurate exchanges when the alleged inaccuracies are no greater than its own. Further, Stouffer alleges that this statement *implies* that only Weight Watchers creates accurate or correct exchanges for its diet program, and thus uses its mark to certify exchange information or food and prevent the competition from using the exchange system. (Tr. 1349-53) Stouffer presents no evidence that consumers interpret the statement as implying that only Weight Watchers exchanges are correct, and therefore has not proved false advertising as to that statement. *Coca-Cola*, 690 F.2d at 317.

The Berger letter's criticisms of the exchanges listed in the 1988 ad - such as the absence of optional calories and certain limited vegetable exchanges - are not materially false, as these disparities did exist in the exchanges Stouffer listed. Berger did not say that Lean Cuisine could not "fit into" the Weight Watchers program; he wrote instead that Stouffer incorrectly represented the "Weight Watchers Exchanges" by failing to include certain exchanges. He wrote this letter before Stouffer changed its ad to list limited meat selections, semisoft/hard cheese and tomato puree. As discussed above, the absence of optional calorie calculations renders these exchanges at least partially false. It therefore was not misleading for plaintiff to tell its members that the Stouffer ad incorrectly represented Weight Watchers exchanges.

Stouffer also has not proved that Weight Watchers committed the common law tort of injurious falsehood. A defendant commits "injurious falsehood" when it publishes a false statement harmful to the pecuniary interests of plaintiff, with intent to deceive and with knowledge of the statement's falsity or with reckless disregard for the truth of the statement. *Restatement (Second) of Torts* §623(A). There is no evidence here that Berger or Weight Watchers made a false statement about the Stouffer advertisements with an intent to deceive.

Stouffer alleges also that, in effect, Weight Watchers has deceived its members and the United States Postal Service by representing itself as a service organization dedicated to the health and well-being of its members when in fact its real purpose is to make money for Heinz. It has submitted evidence that *Weight Watchers Magazine*, which is published by Weight Watchers TwentyFirst Corp., refused to accept advertisements for Lean Cuisine frozen entrees, and argues that this refusal is unfair and violates postal regulations conferring second class rates on materials published "for the purpose of disseminating information of a *1343 public character, or devoted to literature, the sciences, art or some other special industry." 39 CFR Pt. 3001, Subpt. C, App.

A.

This claim is not convincing. It is not unusual for a company that markets a product and owns a magazine to reject a competitor's ads. *See, e.g., Twin Laboratories, Inc. v. Weider Health & Fitness*, 720 F.Supp. 31 (S.D.N.Y. 1989), *aff'd*, 900 F.2d 566 (2d Cir. 1990). Stouffer has not explained how the magazine's rejection of the ads constitutes unfair competition. Stouffer's sales figures demonstrate that the magazine is not essential to Stouffer's ability to compete. Whether or not Weight Watchers is abusing its second class mailing privileges does not relate to an unfair competition claim, and should be dealt with by the Postal Service and not by this court.

[9] Finally, Stouffer asserts numerous affirmative defenses, including laches and estoppel and acquiescence. As to the laches, estoppel and acquiescence claims, Stouffer argues that plaintiff did not complain or take any action with regard to the ads for a long time, and that Stouffer in fact had been publishing "Weight Watchers Exchanges" since 1981. Stouffer claims that plaintiff's delay harmed Stouffer because it expanded and developed its advertising program thinking there was no opposition. (Def. Mem. at 22) To prove a laches defense in a trademark case, defendant must show that "plaintiff had knowledge of defendant's use of its marks, that plaintiff inexcusably delayed in taking action with respect thereto, and that defendant will be prejudiced by permitting plaintiff inequitably to assert its rights at this time" *See Cuban Cigar Brands N.V. v. Upmann International, Inc.*, 457 F.Supp. 1090, 1096 [199 USPQ 193] (S.D.N.Y. 1978) (Weinfeld, J.), *aff'd mem.*, 607 F.2d 995 (2d Cir. 1979). That defendant continued to spend money on advertising which exploited the Weight Watchers mark is not prejudicial reliance. Defendant has offered no evidence that it was harmed more than it was helped by Weight Watcher's insignificant delay in bringing this action. Therefore, it cannot prevail on its laches defense.

Further, plaintiff's prior knowledge that Stouffer

had been providing Weight Watchers exchanges to consumers who sent away for them does not bar it from suing on the advertisements. The potential impact of the advertisements obviously was much greater than the impact of pamphlets sent in response to individual requests; plaintiff's judgment that the publications available by mail were not worth the hassle of a lawsuit does not constitute estoppel or acquiescence.

For the above reasons, defendant's counterclaims and affirmative defenses are dismissed.

VI.

Plaintiff requests both injunctive and monetary relief; it asks for a broad injunction against any use of the Weight Watchers mark in connection with any dietary exchange information, and against representing that defendants' products are equivalent to or fit into or are interchangeable with Weight Watchers exchanges or diet program. It asks also for a judgment ordering defendants to destroy all infringing advertising material, to account for and pay all profits from the allegedly infringing acts and to pay costs and attorneys' fees. I have found trademark infringement only as to the first two advertisements, on the basis of these advertisements' confusing use of the mark "Weight Watchers." Further, I have found false advertising in the 1989 ad only as to certain exchange information, and not as to claims of "fit" in the ad copy. Accordingly there is no basis to enjoin defendants from ever using the "Weight Watchers" mark, nor from stating that Stouffer's Lean Cuisine products fit into the Weight Watchers program, for reasons discussed extensively in this opinion. As discussed above, Weight Watchers is entitled only to the limited remedy of an injunction against Stouffer ads that do not include optional calories in the exchange data.

[10] Defendants are enjoined, however, from publishing the 1987 and 1988 advertisements. Under the Lanham Act, the issuance of an injunction re-

quires neither demonstration of actual consumer confusion stemming from the infringement, nor actual injury to plaintiff. *Vuitton et Fils, S.A. v. Crown Handbags*, 492 F.Supp. 1071, 1077 [206 USPQ 907] (S.D.N.Y. 1979), *aff'd mem.*, 622 F.2d 577 (2d Cir. 1980). The mere likelihood of such injury is sufficient to warrant an injunction. *Monsanto Chemical Co. v. Perfect Fit Mfg. Co., Inc.*, 349 F.2d 389, 392 [146 USPQ 512] (2d Cir. 1965), *cert. denied*, 383 U.S. 942 [148 USPQ 772] (1966), *quoted in Vuitton et Fils*, 492 F.Supp. at 1077. As discussed at length above, the two earlier advertisements use the "Weight Watchers" mark in a potentially confusing manner, and are misleading because of their errors in accurately presenting the dietary exchanges for Lean Cuisine entrees.

Although this constitutes a finding of likelihood of confusion, it is important to consider*1344 the well-settled doctrine that the "grant of injunctive relief depends upon whether such relief is necessary as a matter of equity to relieve against threatened further violations." *Menendez v. Saks and Co.*, 485 F.2d 1355, 1375 [179 USPQ 513] (2d Cir. 1973), *rev'd on other grounds*, 425 U.S. 682 (1976). Thus, a permanent injunction is proper only when there is a likelihood not only that consumers could have been misled in the past, but that consumers will be misled in the future. *See Burndy Corp. v. Teledyne Industries, Inc.*, 748 F.2d 767, 772 [224 USPQ 106] (2d Cir. 1984). That these ads were published two years ago, and have been replaced by a non-deceptive, non-infringing advertisement would suggest that defendants do not intend to publish these ads in the future, and that injunctive relief is therefore unnecessary. Nonetheless, defendants have not promised to refrain from publishing the infringing 1987 and 1988 ads, or any substantially similar ad FN17; indeed, their position throughout this suit has been that the ads were not infringing or misleading. There is thus a small possibility of future harm, and plaintiffs are entitled to an injunction prohibiting publication of the two infringing advertisements. *See, e.g., National Geographic Society v. Conde Nast Publications, Inc.*, 687 F.Supp. 106,

110 [8 USPQ2d 1430] (S.D.N.Y. 1988).

Plaintiff asks also for an accounting and payment of any profits to defendants from their infringing acts. Such relief is denied, because as discussed below, the circumstances of this case do not merit an accounting under 15 U.S.C. §1117(a). Further, plaintiff has not adequately shown actual confusion - and thus actual damages - caused by the first two advertisements. Consequently, the only remedy for trademark infringement and false advertising in the 1987 and 1988 advertisements will be injunctive.

Section 1117(a) of the Lanham Act governs damage awards for infringement of a registered trademark. It provides, in part, that when a violation has been shown, "plaintiff shall be entitled ... subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party."

15 U.S.C. §1117(a).

[11] A defendant's infringement of plaintiff's trademark does not automatically entitle plaintiff to an accounting. *Cuisinarts*, 580 F.Supp. at 636 (citing *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125 [73 USPQ 133] (1947)). Rather, an accounting is

appropriate if defendant "is unjustly enriched, if the plaintiff sustained damages from the infringement, or if an accounting is necessary to deter a willful infringer from doing so again." *W.E. Bassett Co. v. Revlon, Inc.*, 435 F.2d 656, 664 [168 USPQ 1] (2d Cir. 1970). Here, plaintiff did not present evidence that it sustained damages from the publication of the infringing ads, as plaintiff's survey evidence of actual consumer confusion was substantially flawed. Further, plaintiff presented no evidence of actual money damages sustained.

The only other bases for granting an accounting, therefore, would be defendants' unjust enrichment or bad faith. Stouffer would have been unjustly enriched if its sales of Lean Cuisine items were attributable to its infringing use of the Weight Watchers name in its 1987 and 1988 ads. *See Bassett*, 435 F.2d at 664. The burden of proving the amount attributable to defendants' wrongful conduct falls on plaintiff, who must "demonstrate the basis for his recovery with specificity." *Vuitton et Fils*, 492 F.Supp. at 1077. *See Burndy Corp.*, 748 F.2d at 772. Although it is possible that consumers bought Lean Cuisine entrees solely because they were misled by the ads into thinking that Weight Watchers endorsed these food items, plaintiff has introduced no evidence of such sales, and has not proved unjust enrichment. Nor do I find that defendants deliberately violated the law when they published the ads at issue. "An accounting for profits is not *1345 appropriate where the infringer, while in a judge's eyes having violated the statute, nonetheless acted in good faith." *Cuisinarts*, 580 F.Supp. at 640.

Finally, plaintiff cannot recover attorneys' fees, which under §1117 of the Lanham Act a court may award only in "exceptional cases." Exceptional cases are those where acts of infringement "can be characterized as 'malicious,' 'fraudulent,' 'deliberate,' or 'willful.'" Sen.Rep. No. 93-1400, 93rd Cong., 2d Sess. (1974), *reprinted in* (1974) U.S.Code Cong. and Admin. News pp. 7132, 7135, *quoted in Vuitton et Fils*, 492 F.Supp. at 1078. This

is not such a case.

For the above reasons, plaintiff proved at trial that defendant infringed its registered trademark in advertisements it published in 1987 and 1988. Plaintiff failed to prove that defendant violated trademark laws in connection with the most recent ad at issue in this case, published in 1989. Because the first two ads were misleading, plaintiff also prevails on its false advertising claim as to these ads. But plaintiff failed to prove that the statement in the advertisements claiming that Lean Cuisine entrees fit into the Weight Watchers program is false, and failed to prove that the combination of listing ADA exchanges on Lean Cuisine boxes and Weight Watchers exchanges in the ad was misleading. Plaintiff did prove that exchanges given for some of the Lean Cuisine entrees in the advertisements, including the 1989 ad, were not accurate. Plaintiff failed to prove any of its state law claims.

Defendants failed to prove any of their counter-claims.

The above shall constitute my findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a). The injunctive remedies discussed elsewhere in this opinion will be applied. The parties will submit a mutually satisfactory judgment within 10 days, failing which either party may settle a judgment on 10 days notice.

SO ORDERED.

FN1 See Rose, *Fasting Girls: The Emergence of Anorexia Nervosa as a Modern Disease*; Book Review, *The Atlantic*, July, 1988; Laderman, *Wall Street's Newest Problem: Too Much Money*, *Business Week*, Aug. 1, 1988, at 80.

FN2 For example, to fulfill the daily total for fruit exchanges, a member could select from a variety of fruit exchanges listed in the Week One booklet, including one small apple, 1/2 medium banana, one small or-

ange, one cup of strawberries, and 1/2 cup of orange juice, among other choices. (*Id.*) To meet her intake requirements under the bread exchange list, she could choose two items from among a list of entries including a one-ounce slice of bread, 3/4 oz. of cold cereal, 3 tbsp. of flour, and 1/2 board of matzo, among other choices. (*Id.*)

FN3 For instance, on Week Three, grapes are added to the fruit exchange list, so that a member can fulfill a fruit exchange with either 20 small grapes or 12 large ones. (PX 86-C at 1) By Week Five, if a member chooses, she could use up to 500 calories on alcoholic beverage, chocolate, or cookies. (Pl. Exh. 86-E at 8)

FN4 Section 43 of the Lanham Act provides that:

"Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which -

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act." 15 U.S.C. §1125(a).

FN5 Stouffer argues that Weight Watchers International has abandoned the trademark "Weight Watchers" by licensing it to related companies. The evidence shows, however, that Weight Watchers has re-

tained control over the nature and quality of the trademarked items, (Tr. 620-22; 643-45), and therefore has not abandoned the mark. See *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358 [121 USPQ 430] (2d Cir. 1959).

FN6 Both brands make Chicken Cacciatore, Pepperoni French Bread Pizza, Cheese French Bread Pizza and Deluxe French Bread Pizza. They also make entrees with similar names: e.g., there is a Lean Cuisine "Breast of Chicken Parmesan," and a Weight Watchers "Breaded Chicken Patty Parmigiana."

FN7 Plaintiff claims that a market research study that Stouffer commissioned in 1987 to examine consumers' recall of the first Stouffer ad in *Parade* magazine indicated confusion and thus alerted Stouffer early on that the ads would cause consumer confusion. (DX CQ) But the researchers' findings revealed that when readers of the magazine were asked if they recalled seeing any advertisements in that issue, 5 percent recalled a Lean Cuisine ad, while 1 percent recalled a Weight Watchers ad. Then, the researchers asked those who did not remember a Lean Cuisine ad if they recalled seeing an ad for a lower calorie frozen dinner, and 14 percent recalled a Lean Cuisine ad, while 3 percent recalled a Weight Watchers ad. Finally, for those who still did not recall a Lean Cuisine ad, the researchers named four specific brands. Plaintiff argues that because 16 percent of those surveyed thought they saw a Weight Watchers ad, Stouffer knew of possible confusion, and thus ran the ad campaign in bad faith. But 20 percent of those surveyed thought they saw a Budget Gourmet Slim Line advertisement in that magazine, and 12 percent thought they saw a Classic Lite advertisement. Thus, the survey did not ne-

cessarily alert Stouffer to possible confusion over a specific ad, but merely demonstrated that many consumers do not remember the ads they have seen, and confuse, in an abstract way, various diet frozen entrees.

FN8 This is not the first time Jacoby's survey findings have been criticized. See *American Home Products*, 656 F.Supp. at 1070; *Worthington Foods, Inc.* 732 F.Supp. at 1446. Similarly, Weilbacher's studies also have previously been criticized by courts. See *Coca-Cola Co. v. Tropicana Products, Inc.*, 538 F.Supp. 1091, 1094-95 [214 USPQ 927] (S.D.N.Y. 1982), *aff'd*, 690 F.2d 312 [216 USPQ 272] (2d Cir. 1982).

FN9 In his report, Jacoby mentions that 52 of those sampled had eaten frozen foods as part of a plan to lose weight, and that 6 of these, or 11.5 percent, were classified as confused. This finding is interesting considering that in the over-all sample, Jacoby found that 9 percent of respondents were confused about the Lean Cuisine ad; therefore, it would seem from his study that, although it sounds unlikely, a higher percentage of people familiar with frozen diet food were confused.

FN10 In *Quality Inns Intern., Inc. v. McDonald's Corp.*, 695 F.Supp. 198 [8 USPQ2d 1633] (D.Md. 1988), Jacoby conducted a survey for Quality Inns to show lack of confusion over the company's proposed "McSleep Inn" hotels. The court, finding a certain amount of confusion, wrote that "[b]oth experts acknowledged that there are inherent distortions in surveys which they call 'noise.' But none estimated that the extent of this noise would ever rise above a few percentage points." *Quality Inns Intern., Inc.*, 695 F.Supp. at 219. That finding seems to contradict Jacoby's testi-

mony here.

FN11 Although the screener questionnaire asked whether respondents used cigarettes, airlines or long distance services, it did not screen out those who answered these questions negatively. (PX 71-M)

FN12 Stouffer asserted numerous affirmative defenses to Weight Watchers' claims, some of which I have addressed while analyzing the trademark claims here, and some which I have not yet addressed. Most significantly, Stouffer alleges that Weight Watchers is barred by the statute of limitations, laches, estoppel and/or acquiescence from asserting any claim against defendant. There is no basis for a statute of limitations defense in this suit. The laches and estoppel defenses are discussed below in connection with defendants' counterclaims. Defendant claims also that plaintiffs misuse of its trademark to prevent competition, unclean hands and abuse of process preclude recovery. (Answer PP59-60) As is evident from this opinion, plaintiffs alleged misuse of its trademark does not preclude an injunction against the first two advertisements. However, Weight Watchers' alleged misuse of its trademark will be discussed below in connection with Stouffer's counterclaims.

FN13 As set forth below in Section VI, Stouffer is enjoined from publishing the 1987 and 1988 ads insofar as their copy infringes plaintiff's trademark. That injunction is independent of any issue relating to their exchange content.

FN14 In New York unfair competition cases, courts have placed emphasis also on the existence of secondary meaning in the mark and/or defendant's predatory intent. See *American Footwear*, 609 F.2d at 662. As discussed above, there is substan-

tial secondary meaning in the Weight Watchers mark, but Stouffer's conduct does not reflect predatory intent.

FN15 Another section of the consumer protection statute, N.Y. Gen. Bus. Law §350 and §350-d prohibit false advertising. Plaintiff did not assert a claim under these sections.

FN16 Stouffer's counterclaim that Weight Watchers has unfairly precluded fair use of the term "Weight Watchers" need not be addressed because this opinion allows Stouffer to use the phrase "Weight Watchers" in a non-confusing manner.

FN17 A substantially similar infringing ad would be one using the same or a similarly worded headline, but substituting the current number of Lean Cuisine entrees on the market.

S.D.N.Y.
Weight Watchers Intern., Inc. v. Stouffer Corp.
744 F.Supp. 1259, 19 U.S.P.Q.2d 1321

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